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SPANISH TREATY CLAIMS COMMISSION

Treatise on The Nationality of Corporations

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NATIONALITY OF ARTIFICIAL (MORAL) PERSONS.

By P. Arminjon, Advocate,
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I. Application of the Idea of Nationality to Moral Persons.

Can one, except figuratively and for the convenience of language, speak of the nationality of a corporation, an association, or an endowment? Nationality is a voluntary judicial relation; it implies essentially the consciousness of belonging to a collection and of being submitted to the authority that directs it, it imposes obligations, fidelity, devotion, sacrifice, which have for counterpart rights participation in the sovereignty within the limits of the territory, protection beyond its frontiers; both can have for subjects only individuals. M. Laurent puts this idea of the question in his usual clear way: "Have fictitious beings a country, a nationality, and, consequently, the thousand and one physical, moral, intellectual circumstances which constitute a nation; do they exercise an influence upon fictitious persons as upon real persons? The question is nonsensical. As Procureur-General Leclerc has very well said, whatever effort of the imagination may be made, it can not be said that a fictitious being is French, English, German, or Belgian."[a]

"To attribute subjection to judicial persons," says also M. de Bar, "is a nonsense of a kind to create confusion. A nationality in the technical sense of the word can not be conceded to them, but only a domicile."[b]

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[a] Laurent, Principles of French Civil Law, Vol. I, p. 404.

[b] Theory and Practice of International Private Law, sec. 104, No. 1. See, to the same effect, the authors cited by M. de Bar. Lyon-Caens and Renault express themselves in almost identical terms. Treatise on Commercial Law, Vol. II, sec. 1167. In his book on Artificial (Moral) Persons, M. de Varielles-Sommières endeavors to demonstrate with much vigor and talent that "the moral personality being but a résumé and a representation (purely doctrinal according to the author) of the members * * * has no nationality, for it is only an intellectual process, an image in our brain. * * * Only the members have a nationality" (p. 645, No. 1503). On the other hand, according to M. Planiol, Treatise on Civil Law, vol. 1, sec. 2017–2019: "So-called moral persons have no domicile, since they do not live and since domicile is before all, the place of habitation of a living being." In reality do not these theories, which pretend thus to rectify current language by denying to some rational beings nationality and to others domicile, play a little on words?

It might as correctly be spoken of the nationality of all the generative facts of law, such as a will executed in a certain country or a sale concluded in substance and form according to the terms of a certain law. Once completed, have not these acts everywhere themselves, conformably to the law that governs them, a value of their own, a kind of existence independent of the testator or the contracting parties—in a word, a nationality? Without doubt, it is often important to determine the law by which a certain corporation is governed, the jurisdiction that takes cognizance of it, the taxes levied upon it. It will then be dealt with from these different points of view as domestic or foreign, but it must be well understood that these are simply modes of speech. The words *nationality*, *personal statute* of an association, of a corporation, or of an endowment designate simply the law by whose terms are governed in principle the formation, the consequences, the dissolution of these artificial persons. It would be better to reserve these expressions for real persons; at least it would be fitting to apply them to things or rights only with circumspection, *brevitatis causâ*, without taking them literally and only to avoid circumlocution.

These objections are not destitute of a certain propriety. From all points of view, beginning by that which occupies us, it is necessary to beware of completely assimilating artificial persons and physical persons. At least the nationality of some is not established as that of others and produces results that are not identical.

Is it to be said that current language is wrong in using the same expression in the two cases, and must it be reproved for confounding one word with another? This would be a purism as rigid as inconvenient. Happily, whatever M. de Bar may say of it, judicial science has no such exigencies. The definition that it gives of nationality proves that the essential conditions of this notion are realized by the association, the corporation, or the endowment as by the individual.[a]

Judicially, nationality is only the fact of dependence on a sovereignty. Every subject can and ought to be attached to one of the States among which the civilized world is divided, in order to be directed and protected by it, not only upon the portion of the territory subject to this State, but beyond its limits. This relation implies no other quality than that of subject of laws. The condition of a con-

[a] There is here no question, either incidentally or by hint, of the famous problem of judicial personality. Whether this idea corresponds to a fiction, a reality, to laws without subject, or to physical persons grouped together in view of the collective enjoyment of certain rights I have not inquired. I use the expression "artificial persons" in its common and current meaning, which impresses the mind as rights exercised in a public interest general or collective. It is useless to say that I give to the term "nationality" as broad a meaning as is possible.

scious will is in no way essential to it. The minor child and the lunatic, indeed, participate in it.

If this superfluous condition is not realized by imaginary beings, the necessary and essential quality of subject of laws belongs to them without dispute. In legislation, or at least the judicial practice of all countries, corporations—at least commercial corporations—endowments, often even associations, enjoy moral personality; being persons before the law, they have as such a nationality, and consequently a personal statute. Those even among them to which the judicial personality might have been refused enjoy, necessarily, a personality in fact and represent a sum of interests distinct from those of their members or their administrators—an abstraction that it is unreasonable to compare to acquired rights capable of resulting, in terms of a foreign law, from such contract or such will executed according to this law, and which also is provided with a veritable nationality whose determination is important from numerous points of view.

All the rules relative to the constitution, to the function, to the mode of business, to the capacity [a] of this artificial being are in principle imposed by its domestic law and applicable whatever be the place where it pursues its end, to the exclusion of the local law. Such is the principal interest that this determination offers. It is not the only one. A corporation, an association, a foreign endowment, are dealt with according to the condition imposed on foreigners, especially from the point of view of competency. It is thus that articles 14 and 15 of the French Civil Code are applicable to them. The exercise of certain rights can thus be interdicted to them as to other foreigners.[b] There are countires where the entry of the judicial life is open to them (at least to certain ones among them) only under some conditions (decree of the government, designation by the corporation of a responsible representative, etc.), to which companies or other domestic corporations are not always subjected.[c] Negotiation in the French exchanges of personal securities relating to foreign corporations is regulated by special provisions. The taxes to which the shares and bonds of foreign corporations are subjected are not collected according to the same rules as similar taxes levied upon the shares of French joint stock companies.[d]

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[a] Notably to act justly.

[b] For example, the right of teaching in France; to be the owner of a ship flying the French flag; to take part, through the agency of directors, in the election of consular judges, etc.

[c] Concerning foreign associations. Introduced by Law of the German Civil Code, art. 10; German Civil Code, art. 23; French Law, July 1, 1901, art. 12.

[d] Lyon-Caen and Renault, Treatise on Commercial Law, Vol. II, Nos. 1161–1164.

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It is accessorily to the study of the judicial condition of foreign commercial corporations that the nationality of these corporations, basis of their condition, has been studied by the authors. Those among them who have treated this question in its ensemble, or relative to a special subject, such as bankruptcy or the fiscal system, have found it to be sufficient in establishing summarily the criterion, by the aid of which a domestic corporation can be distinguished from a foreign one. They have done this without preoccupying themselves with associations, endowments, or even civil corporations, and in inspiring themselves especially with a desire of foiling the fraud that they take great care however not to define. In what does fraud consist? Under what conditions does it exist? It is that which no one, to my knowledge, has seriously investigated. So there is the greatest uncertainty in all this matter.

Numerous systems have been proposed with a view of fixing the nationality of commercial corporations. We will pass them in review and shall see that no one of them is fully satisfactory. Each of them has been imagined in respect to a particular kind of company, joint stock or copartnership, for example, and its exclusive criterion, which already operates badly when applied to other corporations, is yet more inefficacious when the attempt is made to apply it to associations and endowments.

It is fitting, then, to study the nationality of imaginary beings in itself, separated from the consequences that can proceed from it. The study will bear upon the acquiring and change of this nationality. Of these two points, the first is much the more important and will retain us the longer time; it is almost the only one that has occupied the expounders. Upon the consideration of what facts is the nationality of an imaginary being determined? Such is the problem. The number of true or false solutions of which it appears susceptible is not unlimited, but, on the contrary, very restricted. It is important to examine them, to criticise them, to seek out which in a general way is the better one. This done, it remains to determine what modifications and what corrections the theory adopted ought to undergo when it shall be found insufficient, in what measure it is possible to recur incidentally to such other system rejected in principle to complete or supplement it.

Before passing rapidly in review the systems proposed by doctrine or adopted by jurisprudence, let us recall again that they aim only at corporations—it can even be said commercial corporations. That is why certain of them are inapplicable to associations and endowments, which at first view is not in their favor.

For greater clearness I am going to present them, discuss them, and try to correct that one of them which seems to me the better one,

without giving to them a meaning broader than has always been given. Let us study, then, at first the nationality of corporations; we shall seek afterwards in what measure the ideas and the solution adopted occasionally in their behalf apply to associations or endowments, and upon what point it is fitting to modify them in making this application.

II. Nationality of Corporations.—Systems Proposed.—How is such Nationality Determined?

In order to declare the newborn child subject of a certain State recourse can be made to only one of the two following circumstances, which, in attaching it at the moment of its birth to a person or a thing possessed by this State, make of it as one of its natural appurtenances, viz, the territory upon which this birth has taken place, the parents to which the birth is due.

When it is a question of attaching, at the moment of its constitution, a corporation to a State, a solution presents itself immediately to the mind. Who says corporation says contract, or at least an ensemble of rights and obligations born of an initial contract. According to the nationality which will be attributed to it, the corporation will produce very naturally, from very different important points of view, different results. Is it not logical to seek by all means the nationality which the parties have wished to attribute to the corporation they create? This idea has been expressed more or less clearly, sometimes with much force, by the majority of the speakers of the two congresses upon joint stock companies held in Paris in 1889 and 1900; we shall see that it has inspired two at least of the systems that are going to be presented; therefore, I shall have occasion to speak of them again. It is necessary to lay them aside until then, for it has the effect of allowing the interested parties to withdraw themselves from imperative and prohibitive rules whose application or nonapplication constitutes precisely the problem of the nationality of imaginary beings.

The French law imposes on civil and commercial corporations to which it applies a condition that some consider hard and troublesome, and from which results by comparison a situation enviable for foreign corporations which operate in France without, nevertheless, depending on French public power and law. The organizers of a French company could not put aside directly by a clause of the organic (constitutif) act those of its legal provisions which are not interpretative or suppletory; they can no more put them aside in referring themselves to the rules of a foreign law; and it is this last course they would pursue if they attributed to their company a nationality chosen with the sole object of checking these pro-

visions. Useless to insist upon a truth so simple. Its evidence is such that those who disregard it do not do so openly, but, in attributing to the parties the right of choosing a foreign social nationality, they subordinate the validity of this choice to the realization of a condition which implies or presumes it.

The nationality, therefore, of a corporation can no more be determined by the will of its organizers than the nationality of a newborn by the will of its parents. There could be no question in the first case of *jus sanguinis* or of *jus soli* as in the second. The embarrassment is greater; one can hesitate between five, perhaps six, facts which themselves establish or seem to establish, respectively, between this corporation and this State a relation whose logical force it is sometimes more easy to feel than explain. Authorization given by a State to the constitution of the corporation, country upon whose territory this constitution has taken place, nationality of the associates, country of subscription or domicile of the subscribers, finally, social domicile, expression which can be taken in two different senses and thus mean two distinct things—such are the facts, capable, moreover, of being combined, which are presented to the mind in search of a criterion permitting it to distinguish domestic corporations from foreign ones. What are then their value and their meaning?

FIRST SYSTEM.—THE CORPORATION TAKES THE NATIONALITY OF THE STATE WHICH AUTHORIZES ITS EXISTENCE.

"Every judicial person," according to M. P. Fiore, "acquires a legal existence by means of an act of foundation approved by the supreme authority; and it is to this act that we must refer in deciding whether the judicial person is domestic or foreign." [a]

"Every corporation," says M. Weiss, "is foreign that is formed with the express or implied (?) assent of a foreign State, which in giving existence to it communicates to it at the same time its nationality." [b] The majority of authors presents this solution as evident; they hasten to add that it is rarely applicable in fact because, almost everywhere, the different corporations are established without any authorization being necessary, this condition having been maintained only in some countries and only for joint stock companies. This suffices, nevertheless, in order that this system may not be purely theoretical, and merits justification. It can be done by considering the corporation authorized as a creation of the State which has given it judicial life by the *fiat* of this authorization, or more simply by supposing in this State the sovereign will of treating this judicial person as its subject.

[a] International Private Law, translation, Pradier-Fodere, p. 638.
[b] Same, Vol. II, p. 150.

Let us now remark that this proposition is purely gratuitous. Where it is yet exacted, governmental authorization is imposed on foreign as on domestic corporations. Foreign joint stock companies can operate in Russia only after their statutes have been examined by the Imperial Government and a ukase of authorization obtained from it, exactly as Russian companies,[a] save certain exceptions.[b] A Turkish rule of November 25, 1887,[c] imposes similar provisions. Same regulation, or almost the same, in regard to joint stock companies in Austria,[d] in Roumania,[e] in Brazil. We must then modify this too positive system by saying that the approbation given to the statutes of a company communicates to it a certain nationality only if this company realizes certain conditions; in other terms, has already virtually the nationality of the State whose authorization is solicited. In Greece the preliminary individual authorization is imposed on national joint stock companies differently from foreign joint stock companies, which can obtain, under reciprocal conditions, a collective authorization accorded by a law, a decree, or a treaty belonging to all the companies in the same country.[f] The authorization in no wise there determines the nationality of imaginary beings, but supposes it already accomplished.

This supposed solution leaves the problem untouched.

SECOND SYSTEM.—THE NATIONALITY OF A CORPORATION IS DETERMINED BY THAT OF THE COUNTRY WITHIN WHOSE JURISDICTION IT HAS BEEN ORGANIZED.

This system has been maintained with much conviction by the majority of speakers who participated in the congresses of joint stock companies held in Paris in 1889[g] and 1900.[h] This system is marked, in effect, on first examination by a two-fold quality very much appreciated by practitioners—simplicity and clearness. The constitution of an imaginary being in a certain country is a fact as easy to verify as the birth of a child upon a certain territory. This system is also, they say, very rational; a corporation born in the

[a] Russian Imperial Decree of November 9, 1887.

[b] Yearbook of Foreign Legislation, 1889, p. 806. Concerning the status of foreign corporations, especially of French corporations in Russia, see J. Barkowsky, Journal of International Private Law, 1891, p. 712, and Winter-Haller and Journal of International Private Law, 1898, p. 40 et seq.

[c] Journal of International Private Law, 1888, p. 438.

[d] Royal Imperial Order of Austria, November 29, 1865.

[e] Roumanian Code of Commerce, art. 244.

[f] Euclides Legal Status of Foreign Commercial Companies in Greece; Journal of International Private Law, 1889, p. 59 et seq; Greek Code of Commerce, art. 37; law of August 10, 1881, art. 2.

[g] Stenographic report, pp. 208, 211, 212, 213, 227, 228, 235.

[h] Stenographic report, pp. 291, 298, 299, 304, 310, 312.

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domain of a State under the empire of its territorial sovereignty, ought naturally to attach itself to it. Indeed, the corporation is a contract, for all that which concerns the formal conditions of voluntary acts is determined by the law of the place of organization in virtue of the rule *locus regit actum.* This same law governs, according to the opinion commonly admitted, the greater part of the substantial conditions and the effects properly called of the act in case of silence or of insufficiency of these provisions, for it is to this law that the parties have, in all probability, referred themselves when their wills concurred upon the subject-matter of their agreement. "The corporation is born of the works of some one, it is constituted in a country in order to be something, * * * and it is very natural that it be made that which the authors themselves wish to make it. * * * If an act creating a corporation is passed in a foreign country, it is that the corporation may have the character of the country where the act shall have been passed. If you do not wish to have the English nationality, do not go to England.[a] Why should this will be inefficacious? "When any man can live anywhere where he is not born, there exercise a trade or a profession without thereby losing his nationality, when any man has the right of adopting a nationality other than his own without thereby losing the international benefits in the countries in respect to which he has committed a definite act of abandonment, the right would be denied a company to choose the laws under which it intends placing itself."[b] The advocates of this theory willingly acknowledge the facilities it offers for fraud, but they waive the objection by observing that fraud vitiates all that it inspires and that no account will be taken of an organization of corporation fraudulently effected in a foreign country. They neglect, unhappily, to point out under what conditions the exercise of a recognized power can be fraudulent. From the moment that the nationality of an artificial person is made to depend on the will of its organizers, it ought to be said when and how this will cease legitimately to be exercised.

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[a] Congress of Corporations of 1889. Observations of M. Brunard, Report, p. 213.

[b] Congress of Corporations of 1900. Observations of M. Cassano, Report, p. 291. Various judicial decisions, almost all of which relate to corporations alleged to be fraudulently constituted, seem to implicitly admit that the place of the act might have served to determine the nationality of the corporation if it had been chosen in good faith. See Tribunal of Commerce of the Seine, November 17, 1875; Clunet, 77, p. 45, and February 10, 1881; Clunet, 81, p. 158; Cass. (Ch. Cr.), November 21, 1889; Clunet, 1889, p. 850. Tribunal of Commerce of the Seine, January 7, 1891; Clunet, 92, p. 1025, October 22, 1895; Clunet, 1896, p. 138. Gand, April 21, 1876; Clunet, 76, p. 305, Court of Alexandria, December 12, 1895; Clunet, 1896, p. 904; Clunet, 1888, p. 652.

On reflection, this system appears much less simple and less clear than at first approach. In what consists exactly the fact it proposes? What do its advocates mean by "constitution, act constitutif?" Does it suffice that the instrument, properly called, which contains the agreed clauses has been signed in a certain country in order that the corporation which it rules may take the nationality of that country? Is not this nationality rather that of the State conformably to whose laws the organic act has been published? How to decide, may be said in passing, if many organic acts have been passed and published simultaneously upon many territories? Is not this vague expression susceptible of clothing yet other meanings? What is meant by the place of constitution? "A corporation is not constituted solely by a notarial act. There are other things. There is the total subscription of shares, the payment of all or a portion of each share, meetings of the shareholders, votes—there is an entire organization without which the corporation is not validly constituted." [a]

To this pressing question of the President of the Congress of Joint Stock Companies in 1889 the stenographic report records no response. If one was not given, it is perhaps that the advocates of this solution were not entirely settled as to its meaning.

THIRD SYSTEM.—NATIONALITY OF THE STOCKHOLDERS.

"A corporation or association, being in reality only a group of individuals bound by reciprocal engagements and common interests, has no other nationality than that of its members." [b] In maintaining this opinion, with his habitual clearness, M. de Vareilles-Sommières does it without distinction, if not without restriction. His followers are not so logical; they limit its application to civil or commercial personal companies and associations. Thus restricted, this system produces a very favorable impression at first view. A copartnership, all of whose partners are German, seems at first sight to be German, even if it has the object of exploiting a business in Paris; a club, a company of mutual insurance, composed of Frenchmen living in London, produces equally the impression, perhaps superficial and incorrect, but in appearance clear and distinct, of something French. The trouble begins when one seeks to justify this instinctive and spontaneous opinion. Why, then, should associations, partnerships, or limited partnerships, at least by interests, and civil companies clothe themselves with the nationality of their associates?

[a] Observations of M. Larombiere, Report of Congresses of 1889, p. 230.

[b] Vareilles-Sommières, Synthesis of International Private Law, Vol. II, p. 74. Moral persons, p. 645, sec. 1503 et seq.

Two explanations, perhaps three, are presented to the mind. According to the first, the corporation or association takes on the nationality of its organizers or of its members, at least that which they had from the time of its constitution; because it is this nationality which they have in all probability intended to communicate to it. New application, very doubtful, of the famous principle of the autonomy of the will, which I shall attempt further on to define in its relation to this matter. According to the second, associations and personal companies have not a personality distinct from that of their members; they are simply these members united by a contractual lien and considered as such. The patrimony of the members is liable, indeed, for the social contracts, which shows that it is not distinct from them. Even so, bankruptcy, interdiction, death of one of the associates jointly held dissolves the company. This company, then, at the moment of its constitution puts on the nationality of its members; it is in the same situation for all that which concerns the personal statute and the obligations imposed on compatriots or foreigners. What more natural, since it is only the associates themselves? "The civil personality," says M. de Vareilles-Sommières, "is only a light veil thrown over the associates in order to unify their group and condense them into a single person, which is not distinct from them since it is they themselves and is composed only of them. Its nationality can be made only of theirs." [a]

Applied to joint stock companies, as this author does not hesitate to do, this idea seems untenable. The judicial condition of a joint stock company could not without absurdity depend on the numerous and uncertain nationalities of momentary holders of all the fractions of their capital and vary with them. So M. de Vareilles-Sommières modifies his principle in the application he makes of it to those companies in a way that transforms it into a wholly different theory—to which we shall have to refer—and which subordinates the nationality of personal groups to that of their "dominant element" in leaving the judge to seek arbitrarily the characteristics of this element.

Considering only companies of persons and associations, this explanation merits refutation. It has been very simply done by the

[a] The Synthesis of International Private Law, Vol. II, p. 78. On this side of the question, Brocher I, 193. Civil Court of the Seine, May 26, 1884; Journal of International Private Law, 1885, p. 192 et seq., 88, 2, 89 (note of M. Chavegrin). Swiss Federal Court, November 11. 1892; Journal of International Private Law, 1894, p. 640. Court of Alexandria, March 11, 1899; B. L. J. eg., XI, p. 140. On the opposite side of the question, Commercial Court of Havre, February 3, 1874, and Court of Nancy, April 16, 1883, S. 88, 2, 89. Tribunal of Commerce of the Seine, October 24, 1895. Journal of International Private Law, 1896, p. 138. Aforementioned Note of M. Chavegrin. Cohendy Note under D. P., 1890, 2, 1. And the authors who adopt the system about to be discussed.

following consideration: From the moment that the company has a patrimony and domicile of its own it can not be seen why it is not capable of having a condition distinct from that of its members. It is true that it is affected by bankruptcy, interdiction, or the death of these members, and that in this sense its personality can be said to be bound to theirs, but, on one hand, this dependence is not essential and can be put aside in French law by the act constitutif; on the other hand, the induction that is pretended to be drawn from this cause of dissolution is extremely feeble. That which it is necessary to consider for determining the nature of the social personality is this personality itself and not the causes of death which threaten it. While this personality lasts it must produce in principle its effects within the limits which are traced for it by the sovereignty on which it depends.

Extended to all corporations and associations, or restricted to joint stock companies, this theory, whatever may be the justification given it, meets, when applied, such difficulties that it is not very often of any utility, unless it is transformed as this author, whom I have just cited, has done. Is the fact upon which it rests at least susceptible of being combined with other presumptions and completing them in a way either to facilitate the judge in discovering the competent law or in permitting him to counteract fraud? I will examine this farther on.

Modifying the explanation, whose presentation has just been given, in a way to maintain the distinction generally admitted between the personality of the corporation and that of its members, it can yet be said that the corporation ought to be ruled by the domestic law of its members and assume their personal statute, because this law, at least in its imperative or prohibitive provisions, has been imposed with a view of protecting the members and of enlightening and directing their will, whatever may be the place where this will has been expressed and whatever may be the situation of its object.

To formulate this idea is to refute it. Evidently, the rules upon corporations have nothing in common with the condition and capacity of the members, and relate only to the corporations themselves—at least, domestic corporations.

FOURTH SYSTEM.—COUNTRY OF SUBSCRIPTION OR DOMICILE OF THE MAJORITY OF THE SHAREHOLDERS AT THE TIME OF SUBSCRIPTION.

This theory is not a simple variant from the preceding one. One can, it is true, present the fact upon which it rests as a sign of the will of the parties and presume that the signers of the social act or those who have adhered to it have chosen for their corporation the nationality of the State to which they attach themselves, either by

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their nationality or by their domicile. But it is not upon this ground that its principal advocate seems to place himself. According to M. Thaller [a] the *raison d'être* of the provisions relative to the constitution and the operations of corporations is to protect the domestic capital and defend the interests of their holders against the dangers pertaining to enterprises organized under form of corporation. So it is the law of the country where this capital is collected in view of such an end which ought to be followed for ruling "the agreement which is established under its ægis and obeys in form and substance its prescriptions." Indeed "the stockholder ought to have representatives of the management upon the soil of his country; he ought to be summoned to the general meetings which will be held in the same country. He can not be made to go a thousand leagues from there * * * in order to take part in deliberations sanctioned by a law whose purport even he knows not." It is then in its "territorial resort * * * that should be found, if not its only social seat, at least a social seat." For, in the opinion of M. Thaller, as in ours, it is the social seat that determines the social nationality. In other words, the corporation takes the nationality of the country where its capital has been subscribed and even the nationality of each of the countries where this subscription has been able to be carried into effect, for the eminent author has not shrunk from this consequence of his doctrine, without nevertheless concealing from himself the "evident complications" that follow in its train. Why do not the organizers execute as many distinct acts with series of capital belonging to each of the States where they intend placing their shares, even if these contracts should be exactly the same? In the discussion of the multiplicity of failures, when an international corporation ceases its payments, the capital is cut up into as many slices as there are States holders of social values. A process of the same kind applied to the formation of the social property and to a parallel management is not irrealizable. "Would it then be necessary to recognize in the corporation as many domiciles and personal statutes as there are countries where the subscription has been effected? In nowise; it is only necessary that in each of these countries "had taken place a fraction of subscriptions sufficiently important for the tribunals to consider."

Such is, presented in its large lines, this curious and original system, which, by determining the nationality of the corporation by the seat of its domicile, places this in the country of the subscription. Its practical results seem unsatisfactory. It suppresses entirely the right of the parties to establish the social domicile where they wish,

[a] Annals of Commercial Law, 1890, 2, 257 et seq.

a restriction at first view quite arbitrary. Perceiving in a corporation only the agreements occurring between the members, as if the corporation itself was not distinguished from them, as the effect is distinguished from the cause, it declares strictly territorial the legislative provisions relating to these agreements at least when they relate to a joint stock company, in this sense that it submits them, in their conditions of form, of substance, and their effects, to the legislation of different countries where they are concluded among a number of persons which the judge estimates as sufficiently large. Its application at first view appears complicated, laborious, impractical; it leaves a vast field to the personal estimation of the judge, which is to be regretted. Finally, it does not even seem conformable to these agreements which it supposes tacitly intervening between the organizers and each domestic group of subscribers. These have not apparently considered the inextricable "complications" of which M. Thaller speaks, however "evident" he supposes them; they have been obliged to foresee that the company of which they became members depended—from the point of view of the personal statute as from many others—on the State to which a natural relation of appurtenances and of dependence, a veritable nationality, binds it.

Can it be said that the fact of the subscription of the social capital in a certain country implies a relation of this kind? The whole question is there. Why should it imply this relation? Because those who subscribe to the conditions of the act constitutif in a country and there pay their social parts are regarded as subjects of this country or there have their domicile. More probably (and such appears indeed the reason which inspires M. Thaller) because these persons—whatever may be their nationality or their domicile—contract under the protection of the public power and the law of this country, and that the corporation, result of their contract, ought to depend on this authority and this law. Both of these explanations could as logically impose the fixing of the administrative seat of the corporation at the domicile of the majority of the subscribers. It is this which was proposed, at least by additional title, at the Congress of Companies in 1900.[a] Both are inadmissible.

The first is very often contrary to the reality. The capital collected in a locality does not necessarily spring from it, but has ordinarily been drained from almost everywhere. Those who have paid it are often only those who have lent their names, or middlemen, such as a syndicate of bankers that proposes to give back to their customers the shares which it has subscribed. Anyhow, the laws upon corporations have nothing in common with the capacity of the members, less

[a] Stenographic report, p. 308.

yet with that of the organizers or the subscribers. The second attaches an undue importance to a circumstance very often accidental, secondary, and foreign to the corporation itself. The considerations which have determined the choice of establishments of credit situated in one country rather than in another as instrumentalities of the subscription are almost always drawn from the financial or monetary state of the market in this country; abundance or scarcity of money, political events, taxes on brokerage or commission previously deducted from the issuance, transient condition which influences during certain periods capitalists toward certain enterprises, etc.; these are some of the reasons that determine the organizers to appeal to the public in England or in Germany rather than in France or in Belgium.

No logical lien then binds the corporation to the States upon whose territory its capital has been subscribed. The element to which it is fitting to attach itself to determine the nationality of the corporation must be sought among the attributes of its personality and can not be borrowed from extrinsic facts, even though they should have occurred occasionally at its formation.

FIFTH SYSTEM.—THE NATIONALITY OF THE CORPORATION IS THE SAME AS THAT OF THE COUNTRY WHERE IT HAS ITS PRINCIPAL PLACE OF BUSINESS.

Indeed, ask the advocates of this system, for what corporations have the different States imposed provisions on this question? Evidently, for the corporations whose principal establishment is upon their territory. Each State claims as its own and treats as domestic the corporations that realize this condition. Claim very justifiable, for the corporation attaches itself naturally to the State whose organization protects it, by the authority of which it exercises its activity. Where can be found a more logical lien, a fact implying in the same degree dependence, appurtenance, and therefore subjection?

These considerations seem just; they have attracted the almost unanimous support of doctrine and jurisprudence, and have inspired the Belgian, Italian, and Portuguese laws.[a] It remains to know

[a] Belgian law of May 18, 1873, art. 128 et seq.; Italian Commercial Code, art. 230; Portuguese Code of Commerce, arts. 109–111, translation, Lehr, pp. 40–41; Roumanian Code of Commerce, art. 239; Act 44 of February 25, 1889, of the State of Nevada, Yearbook of Foreign Legislation, 1890, p. 918; Circular of the Swiss Federal Department of Justice and Police * * * concerning the inscription in the Commercial Register of Foreign Commercial Companies. " * * * it is customary to inscribe branches of foreign companies in the register * * * provided these societies are validly constituted at the place of their principal seat. * * * This usage should be sanctioned." Journal of International Private Law, 1900, p. 443.

what is meant by the expression "domicile" applied to a corporation. Here the understanding ceases. By the terms of article 102 of the civil code "the domicile is the place of the principal establishment." But where is the principal establishment of a corporation found? Is it to be placed in the country where it realizes directly and materially its aim—where it has, in a word, a center of exploitation? Is it not rather in that country where it forms its decisions, where its impulses start from, where it has its administrative center?

In favor of the center of exploitation it is of but little consequence as a reason, moreover very serious, that its meaning is to withdraw as much as possible the fixing of the nationality of companies from the will of the organizers, in order to render all fraud impossible.[a] It is that it does not then depend on an accident, an arbitrary fancy or a choice inspired by the perspective of an interest perhaps illegitimate, but on a circumstance drawn from the nature of things. "It seems natural," say MM. Lyon-Caen and Renault, "to think that the legislator has made laws for the corporations which exercise their profession in the territory upon which it has legislative power; these are the corporations with which the legislator is interested in dealing."[b] It is very just, but the question is exactly to know if the corporation can not be said to exercise its business there, where its administrative center is established.

It is necessary, the advocates of this opinion say, to distinguish the action, realization of the social will, which consists in an expressed decision, and which is accomplished only at the social seat, from its material execution which operates everywhere where the need of it is felt. Now, the place where the corporation lives, the territory where it operates, exercises its activity, realizes its end, is that where it acts and not that where its acts produce their effects. The first is fixed, easy to determine, it can have only one; the second is uncertain, multiple, variable. Therefore there should be no hesitation between the two. A person can not be said to be domiciled everywhere where he exercises his faculties, but only there where he principally resides with the intention of there reuniting all which concerns his interests and his affairs. Likewise for the corporation whose domicile is shown by the principal organs of direction, administration, and control—councils, meetings, agents, offices, bank—which deliberate, act, account, distribute for the social person and represent it with third

[a] Lyon-Caen, Journal of Corporations, 1880, p. 36; Surville and Arthuys, International Private Law, sec. 456; Weiss, p. 418–419; Asser and Rivier, Elements of International Private Law, p. 197; Despagnet, Precis, sec. 64; Boistel, sec. 396; Gand, Feb. 18, 1888; Pasier, 1888, 2, 203.

[b] Treatise on Commercial Law, II, sec. 1167, p. 824.

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parties. If this pretended domicile is fictitious—that is to say, does not correspond really to what it ought to be by definition, having been established for defrauding the competent law—the judges will take no account of it in the determination of the nationality, and will seek on account of that the true social center. It is equally to the judge that those apply for whom the social domicile is confounded with the center of exploitation when the corporation, which is often the case, operates in many countries between which it is necessary to choose.[a]

SIXTH SYSTEM.—THE JUDGE SHALL DETERMINE THE NATIONALITY OF THE CORPORATION IN ACCORDANCE WITH THE FACTS WHICH HAVE BEEN ENUMERATED, COMPLETING THEM, IF NECESSARY, WITH OTHERS.

The real solution, according to this opinion, ought to be sought after in a combination of the systems hereinbefore presented, and which are not entirely satisfactory, neither one nor the other, each of them, as it has been easy to see, being true only relatively and in certain cases.

Not only, indeed, have all of them been conceived only in consideration of commercial corporations, separated from other imaginary beings; associations, endowments, and even civil corporations, but no one of them applies at the same time to corporations of persons and corporations of capital.

Their meaning being thus restricted, it is yet necessary that they reach it in a satisfactory manner. When the criterion proposed by their advocates is not too notoriously insufficient it appears inapplicable, at least in certain cases.

The opinion which submits a corporation to a State upon whose territory its act constitutif has been passed or published attaches a capital importance to a fact which is not, without doubt, to be neglected, which can even serve as an additional and accessory presumption, but which is too accidental, secondary, contingent, in a word, too insignificant by itself to determine the nationality of the imaginary being at whose formation it has participated, as well as other circumstances. We have therefore unhesitatingly laid this aside.

That which applies to the nationality of the members is evidently inapplicable to a corporation composed of members of all nationalities, restricted arbitrarily to the case of a corporation all of whose members are fellow-countrymen; it leaves without solution a difficulty of such a nature as to often present itself; that of a change in the nationality of the members. Is the nationality of the corporation going to change in such a case? How, moreover, establish the nation-

[a] Lyon-Caen and Renault, op. cit. * * * II, sec. 1167.

ality of shareholders of a joint stock company, impersonal and variable crowd, wave without individuality that traverses the company in constantly renewing itself by means of its transactions whose certificates are the object, without the company's ceasing for a moment from being itself in the course of transformations sustained by its elements?

Useless to insist upon the defects of the criterion drawn from the country or countries of subscription, solution that supposes, moreover, admits one of the two following, and limits itself to render it entirely irrealizable.

The theory that subjects corporations to the sovereign of the country upon whose territory they have their "domicile" meets many difficulties in application, whatever be the meaning of this equivocal term. If it means administrative seat, a satisfactory solution is obtained in almost every case, not only judicially but also practically, and yet it will sometimes be insufficient. This may be the case, either when the management is exercised in many different countries, or when the organizers have better reasons, interests the most serious and most legitimate to constitute their corporation in attributing to it such a nationality; for example, that of the State upon whose territory exploitation is exercised, even in establishing its social seat in the territory of another State.

As example of this last hypothesis, let it suffice to cite the case of the company of the Suez Canal, whose statutes declare it Egyptian, although its council of administration and its meetings of stockholders are held in Paris.

To realize the first, let us suppose a copartnership composed of three partners who manage three commercial houses of equal importance in three different countries, and at the head of each is one of those partners; or, indeed, a joint-stock company organized in view of exploiting tramways in an Italian province where is located not only the technical director and delegate administrator, but a council of local administration clothed with very different powers than those exercised by the council of administration which sits in England, as well as the meeting of the stockholders. Is this company English or Italian?

The criterion of the administrative seat does not always suffice, and the system which it proposes needs to be enlarged and completed.

It is yet less accurate to use the expression "social domicile" in the sense of seat of exploitation. In this case it applies very well to corporations that have a purpose essentially territorial, like the concession of a mine, canal, tramway. On the other hand, it in no way applies to corporations that have many centers of exploitation, nor to those whose purpose, capable of being carried on successively

or simultaneously at all points of the globe, consists in services, prestations, the working of an idea, processes, or patents. Such is the case of a corporation of banking or of insurance, especially if it has establishments in many countries, of ocean navigation, of metallic bridge construction, or railroads. What will be the nationality of a company formed for colonizing unexplored or half-savage regions? It is truly too easy to refute this system by absurdity, and its advocates do not escape the decisive objections directed against it when they make the determination of the place of exploitation a question of fact to be settled by the tribunal seized according to the importance of such establishment or such center of affairs, or yet when very arbitrarily they fix, once for all, the nationality of the corporation according to its principal center of primitive exploitation without preoccupying themselves with the transfer that can be made of it into another country, nor of those that it is susceptible of creating moreover in the event.

Indeed to refer to the judge, as MM. Lyon-Caen and de Vareilles-Sommières submit themselves to complete or rectify their respective system when it is inapplicable, by the consideration of "the dominant element" or of the "country for which the corporation * * * has been principally constituted,"[a] is to abandon at least partially this system to the profit of the elective opinion which replaces or completes some by the others of the criterions proposed, and which it remains for me to examine.

In what exactly does this opinion consist?

The rule that it gives is extremely simple; without obliging oneself to seek such or such circumstance to the exclusion of others, the judges ought to separate and conspicuously show the facts which are of such a nature to attach the artificial person to one of the sovereignties in whose domain it relates, afterwards to establish a balance between them. After having separated all the reasons proper to determine their decision, they will draw from them the result and will judge in this sense. "The social seat, the law under whose empire the corporation has been formed, the place of its exploitation, the nationality of its members are only elements whose ensemble alone permits an exact appreciation which will vary according to the nature of the corporation, its composition, its object, etc."[b] "Considering," concludes a celebrated decision of the court of cassation, "that in deciding, *in spite of this ensemble of circumstances which characterizes a French corporation*, that the above cor-

[a] Lyon-Caen and Renault, Treatise on Commercial Law, Vol. II, sec. 1168.

[b] Maguero, Alphabetical Treatise on the Laws of Registration, cited by J. Robin, rules governing foreign securities (Thesis), p. 26.

poration (terminal of Cadiz) has the quality of a foreign corporation, * * * the judgment attacked has violated the said article of the above-mentioned law."[a]

Under this positive form, this system—so far as this name can be given to the denial of all system—is evidently untenable. To let the judge determine according to his impression, to give him for rule to follow no rule but to determine the nationality of a person at fancy in basing his conviction upon the facts or upon the circumstances that he will be pleased to choose, is a solution that has nothing judicial, that is even contrary to the fundamental notion of legal science. The trouble and uncertitude which would result from its adoption is easy to imagine. Either one of the opinions he intends substituting for it is then preferable, for it is a hundred times better to have a narrow and false rule than arbitrariness and fancy. Restricted to the determination of the principal establishment from which results the nationality of associations and corporations, this theory becomes more tenable, and there is little wonder that M. Vavasseur, and after him MM. Surville and Arthuys, has adopted it. "The administrative seat being in one place and that of exploitation in another, where will be the principal establishment?" asks this author. "A very delicate question," he answers, "subordinated to an almost arbitrary appreciation of the judge, for it will vary according to the circumstances and the particular cases; therefore it has occasioned apparently different solutions."[b] And he cites many judicial decisions that are indeed contradictory, these placing the principal establishment at the administrative seat, those at the seat of exploitation.

Even restricted in this special hypothesis, this dangerous power given to the judge to determine a right of capital importance according to the elements which are left to his discretionary appreciation without moreover tracing for him a rule or giving him any directive idea appears fertile in contradictory judgments, incompatible with the security of affairs, irrational, and impractical. If there is a motive for taking account of such a fact, in such circumstances, and of such other, in such other circumstances, it is important to deduce it once

[a] Court of cassation, June 30, 1870, D. 1870–71, 416. While admitting "in general" the criterion drawn from "center of business," the excellent treatise on International Private Law of M. Rolin seems to incline toward the eclectic system. According to this author "the question is not susceptible of a positive solution," Vol. III, sec. 1278.

[b] Concerning corporations constituted abroad and operating in France (Journal of International Private Law, 1875, p. 348); Surville and Arthuys, Course in International Private Law, sec. 456: "We think that it is impossible to give a general rule and that one should adhere to the one of two establishments (the social seat headquarters and the center of operations), which must be considered the principal one in fact."

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for all without abandoning the search of it in each case to the arbitrary appreciation of the judge. It is that which I am going to try to do.

III. Solution of the Problem.

To formulate a rule at once broad and firm, adaptable to all artificial beings, which may leave as little as possible to the arbitrariness of the judge, in allowing him sufficient latitude to take into consideration the satisfactory portions of the theories heretofore presented and criticised, is now the problem.

For solving it, let us recall in a few words what fundamental consideration, sometimes overlooked by their advocates who invoke but few arguments of fact or of practical utility, sustains these systems and communicates to them a truth more or less incomplete and partial.

The system which attributes to a corporation the nationality of the country where it has been organized is rationally justified by a presumption of voluntary subjection. In reality, the authors and the decrees which have adopted it, admit more or less concisely that the organizers or the members of the corporation have intended to give it the legislation in force at the place of its organization for the personal law. They implicitly recognize the validity of this intention and make it productive of all its consequences.

The analysis discovers another idea at the base of the system which submits corporations to the sovereignty of the territory upon which their domicile is established, whatever may be moreover the meaning attributed to this last expression. This idea is, that these corporations attach themselves to this sovereignty and depend judicially upon it, whether their organizers or members wish it or not.

When it is attempted finally to justify the theories which confound the nationality of the corporation with that of its members or those who establish it, either in the country upon whose territory its capital was subscribed or that where its subscribers are domiciled, one is allowed to hesitate, as I have for an instant, between one of two considerations which have just been presented. It can be maintained that the primitive members have intended that the corporation should be subjected to their common domestic law, or to that of their common domicile, it can be claimed that this law for the reasons I have shown, is that within whose jurisdiction the corporation belongs.

Logical domain of the law or of the sovereignty and the autonomy of the parties, such are in the last analysis, expressed in a word, the two fundamental considerations upon which rest these different systems. I have asked myself which of the two ought, on principle, to obtain. Evidently it is the first. It has sufficed to clearly put the problem in order that this advanced solution may be disengaged

from itself. The greater part of the rules concerning corporations are of public interest; designed to maintain the public fortune and credit, the security of transactions, equality between the members, they are imposed on the parties as directive and protective prescriptions of their wills, to which they are not solely proposed. There is the same and yet more laws concerning associations which form in all countries an important branch of public law, placed above private agreements. That one of the laws and jurisdictions in the sphere of which the association or corporation is logically situated, that one of the sovereignties in presence, to which this association or this corporation attaches itself, is imposed on it, whatever may be the will of its organizers or its members.

It remains, it is true, to determine what is this law, what are this jurisdiction or these authorities, what in a word is this sovereignty.

Let us say at once that sometimes it is impossible to make this determination in a manner completely satisfactory, and that obligation is then imposed to recur, as a subsidiary means, to the will of the parties, manifested more or less clearly by different signs.

This recourse to the autonomy of the will is moreover legitimate. We must beware, indeed, falling from one excess into another not less vexatious, of exaggerating the consequences of the character of public interest of the laws concerning associations or concerning corporations, and of refusing all consideration to the choice of the parties.

DOMAIN AND MEANING OF THE AUTONOMY OF THE WILL.

We have just now spoken of one of the most intricate questions of private international law. What in this connection is the meaning of the autonomy of the will? What are the elements of their agreement which the parties are at liberty to submit to the legislation of their choice?

Will this expressed or implied choice have the effect of excluding not only suppletory provisions but also imperative or prohibitive rules of the legislation to which the agreement would have been subjected if this choice had not been exercised? The affirmative is commonly admitted; it forms a traditional opinion so strongly established that the decisions of jurisprudence and the greater part of the authors make no effort to justify it, and announce it as an axiom. Some recent authors[a] have nevertheless very vigorously and in ap-

[a] Brocher, Review of International Law, 1872, p. 189 et seq.; Course in International Private Law, p. 315 et seq.; Aubry, "Domain of the law of autonomy" (Journal of International Private Law, 1896, p. 465, 471); Vareilles-Sommières, Synthesis of International Private Law, Vol. I, sec. 396–402; Rolin, Principles or International Private Law, Vol. I, sec. 251–291.

pearance successfully refuted it by adopting without reserve the contrary argument. "The law of autonomy being only a tacit agreement, its domain will be exactly that of the freedom of agreements. This returns to saying that this domain is limited by the neighboring domain of the public order which surrounds it."[a] In announcing this proposition M. Aubry almost excuses himself "from insisting upon a truth so evident." The proposition seems indeed evident. The imperative or prohibitive provisions relative to agreements have been established by each legislation either for assuring the consent of the parties (conditions of error, violence, deceit, or wrong) or in an interest of order social, moral, or economical (default of cause, illicit cause, object outside of commerce).

In the second case, these provisions do not depend by definition on the will of the parties; they have been imposed precisely to govern this will in directing it in the sense intended by the legislator. In the first they are designed to establish and maintain the existence of a will among the parties, and it is illogical to make them depend on this supposed will whose existence is exactly in question. Such a solution is only a vicious circle, gross error that M. Aubry and M. de Vareilles-Sommières have easily refuted by absurdity. Perhaps these two authors, once their argument finished, might have been able to seek, as I now do, the reasons of the blindness that closes the eyes of so many jurisconsults to the light of this evidence. Who knows if their criticism would not have lost its sharpness?

Remark at first that the parties almost never designate the legislation by which they intend to rule their agreement. Such a designation, supposing it to have taken place, would probably not be freely made with a thorough knowledge of it. One can but little imagine an agreement torn from one of the parties by violence or deceit, or obtained by mistake, which would contain a clause in this style. "All that which concerns the conditions and vices of the consent of the present will be governed conformably to such legislation" (that which recognizes the existence of a consent in the circumstances which have surrounded the conclusion of the act). It is nevertheless this unlikely hypothesis which the authors appear to have in view. The application of the rule of the autonomy presents itself otherwise in practice. Three legislations are face to face, all capable at first view of being applicable to the act; domestic law of the parties, law of the place of organization, law of the place of execution. To which of the three ought the tribunal seized to give the preference? To that one which the parties explicitly or implicitly have chosen. Ninety-nine times out of a hundred the parties have made no explicit

[a] Loc. cit., 1889, 470.

or implicit designation. Therefore it is the expounder himself who makes this designation according to the supposed presumptions drawn from the supposed intention of the parties to refer themselves either to their domestic law, which is familiar to them, or to the law of the place of formation, which they could more easily consult at this very moment, or, finally, to the law of the place of execution, of which they have probably examined the provisions at the moment of concluding, all presumptions which are simply, when closely examined, rules quite irrational, of whose application must result the determination of the legislation to which the agreement in case logically belongs. Can it not be said that it is the consideration, more or less conscious, of this logical dependence, and not that of the problematic choice of the parties, which determines the judge? [a] If he submits, for example, the elements and the effects of this agreement to the law of the country where it has been concluded, it is not perhaps because the parties have there very likely referred themselves. Is it not rather because his judicial instinct reveals to him, more or less confusedly, that the agreement being formed within the empire of this law ought to belong to it?

But let us suppose that the parties have clearly chosen that one of the laws in presence to which they have intended to submit their agreement. Before asserting that this intention is illegitimate, it would be necessary to clearly establish that the chosen law is not admissible, and therefore designate the law rationally competent. It is that which one bewares of doing. He limits himself to vaguely saying that the parties could not "by a word choose a foreign law by which to do in France what French law prohibits," [b] as if there were not always in such cases foreign laws in harmony with the French law; as if it were possible to assimilate the choice restricted among all competent laws, though unequally, which is practically operated in this hypothesis, to the unlimited, arbitrary, often constrained and almost always fraudulent choice, because it is inspired by the sole desire of violating the only competent law, which is gratuitously imagined. These laws are almost exactly balanced; in every case there exists serious reasons for adopting each of them for norm of obligation. Are not the parties from that time justified in making the balance incline to one side or the other? The judge who hesitates between the different laws on which seems to depend by the same right the obligation, is he not also justified in seeking that one of these laws which the parties have considered when they contracted?

[a] See the judicial although somewhat confused remarks of M. de Bar, vol. 1, sec. 247.

[b] Vareilles-Sommières, Synthesis, vol. 1, 247, sec. 401.

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We are not here concerned with internal law in the cases where a single legislation is applicable and where, consequently, its strictly imperative rules inevitably impose themselves. We must not lose sight of that. We are, on the contrary, in the international domain possessed by many legislations in joint tenancy, whose provisions are neutralized in a certain measure in such a way that it is perfectly admissible to allow the interested parties to choose among them. The alternative is not set up as in internal law between the imperative law and the will of the parties, but between two laws, one of which has been chosen by the parties. The two situations are very distinct. Although the parties can not be admitted to renounce in advance purely and simply the benefit of the rule which establishes a recourse based on deceit and wrong, the opinion can, nevertheless, be admitted without rejecting it *a priori* as absurd, which validates this renunciation when it results from the adoption made in good faith by the parties, in view of ruling their agreement in its ensemble, of a law other than that to which their condition and their capacity are submitted. A simple and equitable solution.

We are going to see the application that it is fitting to make of it to the special study of this question. But, first, we must return to the problem whose meaning I have presented and which this digression has not caused me to lose sight of—far from it, for it has much advanced the solution.

To which State do corporations (and, we shall see, associations) logically belong in principle by their nationality? To what circumstance is it fit to attach oneself for establishing the competent sovereignty in their respect? In what measure is it permitted, moreover, to exercise a subsidiary recourse (of which I have shown the legitimacy) to the explicit or implicit will of the parties?

The corporation attaches itself by its nationality to the State whose point of territory is the center of its judicial life—to that between whose frontiers it directs its energy, regards its aim, and pursues its object; in a word, as we have established it, to that of its social and administrative seat.[a] It is there, and not in the country where it utilizes materially its forces, that the corporation thinks, wills, acts,

[a] To this effect, Cass, June 24, 1880, S, 1881, 1, 130; Chavegrin, note S, 1888 2, 89, Cohendy, note D, 1890, 2, 1; Pic., "Bankruptcy of corporations in private international law" (Journal of International Private Law, 1892, pp. 584–585); Tribunal of commerce of the Seine, October 24, 1895; Journal of International Private Law, 1896, p. 138; Cass. (Req.), December 22, 1896, Journal of International Private Law, 1897, p. 364; Tribunal of the Seine, July 12, 1897, Journal of International Private Law, 1898, p. 341; Thaller, Treatise, sec. 625; Bar. I, secs. 47, 104, et seq.; Dicey, Conflicts of Laws, pp. 154–156; Wharton secs. 48a and 105.

lives, and expresses its thoughts and its directive volitions, for it is in this place that its principal organs are employed, as well as their instruments—receivers, controllers, and transmitters.

Manifesting its personality upon the territory in question, the corporation depends naturally, logically, on the sovereign authority which rules it. This proposition is not contested when one deduces from it the choice of the competent tribunal for "deciding the questions and differences which affect the entire corporation"[a]—tribunal which, by general opinion, is that of the place where the administration and direction have their seat; it ought not to be more in its other applications. From the time, then, that the social seat, defined as I have just done, shall be established with certainty, the nationality of the corporation will equally be established, with the exception now to be made.

IV. Concerning Fraud.

We know the objection often directed against the rule that has just been formulated. To determine the nationality of the corporation by a fact that depends directly and immediately on the will of the founders is to render fraud not only possible, but very easy. The organizers not having been able to avoid by an express stipulation the legal provisions normally applicable, will it suffice them for attaining this object to take an indirect way as short and as plain? Desirous of avoiding the severe provisions to which the French law has subjected the constitution, the function and the dissolution of corporations or national associations, to escape the taxes imposed in Italy on Italian corporations they decide that the meetings of shareholders and the council of administration shall assemble in Switzerland or in Belgium, for directing from there a corporation which pursues its activity in Italy or in France—country which serves for residence of the technical director and delegated administrator. This combination is foiled by the system which allows the judges to fix the social nationality according to their impression, without indicating to them any particular criterion, or rather by that which prescribes to them the fixing of it according to the seat of exploitation. The social nationality results, then, from the nature of things, and not from fancy or calculation.

To refute this objection it is observed that fraud vitiates all that it inspires, and that if the social domicile has been fraudulently estab-

[a] Chambery, December 1, 1866, D, 66, vol. 246; Cass. (Req.), February 25, 1879, case of the Swiss Credit Foncier; Journal of International Private Law, 1879, p. 396; Court of Cassation of Florence, June 5, 1896, June 25, 1896; Journal of International Private Law, 1899, p. 323.

lished, which the interested parties will prove by all means, the judge will take no account of it.[a] The refutation is a little summary, it supposes a point cleared up which in reality is very obscure: What is fraud and what are its conditions?

The word fraud is ambiguous, for it designates every effort either to deceive some one, or violate the competent law. In this last sense, that which it means here, it implies two conditions: Nonobservance of the competent law, knowledge of this nonobservance.

What then is the competent law? It is the question to solve in each case, since the determination of the essential element of fraud depends on it by definition. It will often be difficult to answer it. Almost always, indeed, this question is put on the occasion of the concurrence of two legislations: That to which the accomplishment of such a fact, of such a formality, is capable of submitting the condition, the capacity of such person or the validity of such an act, that which would rule the condition, the capacity or the act of which it concerns itself if the first legislation were to be avoided. In what cases, in what measure does this cease to be applicable?

This is the problem proposed. Some of the cases apropos to which these notions are practically realized will permit the measuring of its complexity.

An Italian becomes a naturalized Frenchman. The only motive for this naturalization is to obtain a divorce that the Italian law does not admit. Will the French tribunals receive his petition? Ought they to reject it on account of the fraudulent character of the naturalization? If yes, what will be in Italy the effect of this change of nationality?

A person transfers his domicile into a foreign country with no other intention than to withdraw himself from the jurisdiction of a court which would have had to decide an imminent process.

Two French persons wish to marry abroad with the exclusive object of saving themselves the long formalities costly and complicated imposed in like case by the Napoleonic code, for example, not to make the respectful announcements.

The character common to these different cases is the well-established will among the parties of withdrawing a contemplated act from the provisions of the law which ought to rule it by the accomplishment of a fact, by a displacement or change of condition. These persons realize thus artificially the situation in view of which the rule of international law has been established of whose benefit, for a special and momentary interest, they desire to take advantage of, either the

[a] Pic., "Bankruptcy of commercial corporations in international private law." (Journal of International Private Law, 1892, p. 585.)

rule *locus regit actum*, or that in virtue of which changes of nationality produce changes of conditions, etc.

Different authors who can be cited among the masters of private international law forcibly maintain that such combinations are perfectly permissive. Fraud is the violation of the competent law; now, the *lex domestica* can not be thus qualified [a] from which the parties have withdrawn themselves by the accomplishment of a fact or a formality authorized by this *lex*. Fraud would exist only if they had simulated this fact in a way of substituting an appearance in the place of the reality; for example, in feigning to transfer into another country the center of their interests for creating a belief in a change of domicile. We must guard against confounding these two situations. Having really done what he ought to do for that, the interested party is legitimately right in invoking the benefit of the law conformably to which he has acted without anyone opposing to him a law which is not applicable. Why could not this former Italian, naturalized Frenchman, conformably to the provision of his preceding national law which authorizes expatriation, use even in Italy a right which is conferred on him by his new personal statute? Because he has been naturalized with a view of exercising this right? But naturalization is always inspired by the perspective of the material or moral advantages, it matters but little which, that result from acquiring a new nationality. This acquisition, once realized, ought to produce all of its consequences. The same reasoning can serve to prove the legitimacy of a change of domicile. Finally, "no one can be said to shun a legal rule who avoids the fact in view of which this rule has been imposed, and thus render its application impossible." The same end (here the expression of consent in the contract) can often be attained by different ways, one of which causes less trouble and expense than the other. If for this reason we leave this and follow that, we do not avoid the application of the law; we render this application impossible.[b]

To this reasoning can be opposed plausible arguments that jurisprudence has often inspired, if it has not always expressed. Without undertaking a regular refutation, which does not concern us, let us observe that the question is precisely to know if the law from which the naturalized one, the contracting party, or the eventual defendant have wished to withdraw themselves authorizes their attempt. If not, it can be said that it is really a maneuver designed to violate the competent law, and the definition of fraud is thus realized.

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[a] Wharton, Conflict of Laws, sec. 695.

[b] Thöl, cited by Bar, sec. 122, No. 38.

When the French law recognizes, for example, the validity of a marriage of two French people in Spain according to local form, it considers the normal hypothesis—that where French people, removed from their country by the effect of circumstances occasioned by another cause than the sole will of removing themselves from the French law, they are interested in marrying on the spot, thus saving themselves the costs and troubles that a displacement would impose on them. Likewise it can be said that the Italian law, in allowing their citizens to be denationalized, validates those only of the consequences of this act which are not contrary to its prohibitions. But, I repeat, these considerations are not relative to our subject, and I must limit myself to putting clearly the problem by showing the solution of which it is capable. Returning, then, to the particular point of our interest, I shall have no difficulty in establishing that the notion of fraud, whose definition I have given and drawn some deductions for indicating its bearing, is not applicable to our case, but is realized only in case of simulation of the social domicile.

We have, indeed, previously arrived at this conclusion, which it is important not to lose sight of: That the nationality of a corporation is determined in principle by its social domicile. It matters but little in which country it exercises materially its activity. No more account ought to be taken of the nationality of the members or of the origin of the capital, but the corporation is bound logically, naturally to the sovereignty of the territory where it has its principal establishment. This admitted, fraud is possible only in one case: When a pretended social domicile has been fictitiously established in a place other than that where it is really found, with a view of attributing to the corporation a certain nationality. This simulation is, indeed, a maneuver arranged to defraud the competent law, that of the country in which the corporation has in reality its domicile. This maneuver will be foiled by the determination of the real domicile and of the nationality which is the consequence of it. What if the seat of this domicile has been chosen in a country by the organizers for attributing to the corporation such a nationality? I ask in what is this intention fraudulent, I ask that some one show me the competent law that has been violated or the sovereignty disregarded which was normally designed for governing this corporation. Yet again, there is not here, as in the cases which have just been enumerated, two sovereignties, two legislations in presence; one to which belongs the interested party, the other to which he has wished to submit himself. There is only a single one, the sovereignty, the legislation, of the country upon whose territory the social seat is fixed. To say that the competent law, that the competent sovereignty, have been violated or disregarded is nonsensical, since there exists no other than those whose competency is

contested under the pretext of a pretended fraud irrealizable and even inconceivable. "Considering," says in this sense the Tribunal of the Seine, "that the nationality of a corporation determining itself by the place where it veritably and effectively has its social seat, it is of little consequence that the Atmospherin Nitrogen Company is composed in greater part of French stockholders and that it has for object the circulation of a process of French origin in a manufactory that ought to be situated in France * * *."[a]

It is inadmissible, one will say, that the nationality of an artificial being depends, even indirectly, on the will of its organizers, for they can not do indirectly what they are not allowed to do directly. Their will, and consequently all the facts which depend on it, ought to be without influence upon the social nationality.

For avoiding this objection, let it suffice to recall what has been before presented—that the autonomy of the parties in no wise exercises itself in the same conditions in international law as in internal law; that besides the operation upon a territory of the organs of the administration, of deliberation, of control, depends not all on the pure and simple arbitrariness of the organizers or of the members.

Let us observe finally that this argument is only a reproduction of the sophism that I have already refuted under its preceding form. In declaring fraudulent the pretended Belgian and English nationality of a corporation which has no other relation with England or Belgium than the situation of a domicile upon their territory, one admits *a priori* the existence of a sovereignty (that of the center of exploitation), to which the contemplated corporation normally belongs, which its organizers seek fraudulently to bind to a foreign sovereignty in fixing its domicile upon the territory of this sovereignty. It is stated in principle that the State within whose jurisdiction this establishment is found is the natural State from which the corporation could not be withdrawn; it is deduced that the jurisdiction of this State can no more be laid aside indirectly by the accomplishment of a formality than directly, and that consequently the attribution of a nationality by the fixing of the social domicile in a country is fraudulent. Now, this is exactly the question. It can not too often be repeated, there are not two laws, two sovereignties in presence, as in the application of the rule *locus regit actum*, but a single one, that under the empire of which the corporation is born and operates. Little consequence the reasons which have moved the organizers of this corporation to place it in this judicial domain rather than in another may be that of the State where is the principal center of exploitation; it is not there to seek them, and it would

[a] May 3, 1899. The law, May 27, 1899. Journal of International Private Law, 1900, p. 802.

be vain to maintain that the members were interested from many points of view that the company should be French rather than Belgian, interest that has yielded to the desire of withdrawing themselves from troublesome restrictions. From the moment that the circumstance which logically binds the company to Belgium has been realized, this company is Belgian; every other consideration ought to be laid aside under the penalty of falling again into the theory which, without adopting any fixed rule, is referred to the arbitrariness of the judge.

This leads me to point out a notion of fraud different from that which I have defined, and which seriously limits the system I have adopted. We accept this system, the advocates of this new opinion say; we admit that the nationality of the corporation is that of the country where its social domicile is fixed—that is to say, the administrative seat, but, granting this, we refuse to go so far as to recognize in the organizers an absolute liberty in the choice of the place designated to serve as the seat of this domicile. Their choice ought to be influenced by serious reasons, arising from the interests of the new corporation, of its members, and of its subscribers. If the prudent management of the social capital, the object of the corporation, the territory where it will principally accomplish it, the nature of operations in view of which it is organized, the nationality, or the domicile of the subscribers or of the members reasonably influences the fixing of the social seat in a certain country, the establishment of this seat in another country with which the corporation is united by no lien will be dealt with as fraudulent, it being proved at least that the organizers have made this decision with the sole intention of applying a legislation whose liberal provisions they appreciate. The judges will then have to seek, on one hand, what was the interest well understood of the corporation and its assigns; on the other hand, perhaps if the organizers have wished deliberately to withdraw their corporation from the law and the sovereignty which might reasonably have governed them.

"One is obliged," says M. Thaller,[a] "developing the system presented above, to give to the subscribers, when the contract of subscription is made in France, the guarantee of the observation of the French law upon the corporations and it is in the territorial resort of this same law that should be found if not the only seat, at least a social seat. Every combination which would cause shares to be subscribed in France and would place the social seat in Belgium or London, in a way to float the enterprise according to an English statute or the Belgian law of 1873, to the exclusion of our own law of

[a] Annals of Commercial Law, 2, 1890, p. 257.

July 24, 1867, constitutes a judicial heresy, one of whose terms destroys the other by inflicting on it a contradiction."

"It would be wrong to think," writes an author on his side, advocate of the determination of the nationality by the administrative seat,[a] "that the place of the social seat is a geographical point freely abandoned at the choice of the organizers, and that we fall again into the inconvenience which we desired to avoid in rejecting the criterion drawn from the country where the act constitutif has been drawn up. It does not then belong to the organizer to place the seat of the corporation where he pleases. There is fraud not only when the administration is regarded as sitting abroad and sits in France, but even if the fact of sitting in France is a lie to the statutes." What can be thought of this conception of fraud? It offers at first sight something satisfactory. We shall see further on if the idea which it gives can be utilized after having been completed by its combination with that of the autonomy of the will. Applied here to a case where the determining fact of nationality clearly appears as well as the will of the organizers not to withdraw themselves from it, its practical conclusion, which removes them both, appears purely arbitrary. It is easy to there recognize, slightly modified and restricted, the elective theory which I have previously criticised, in the terms of which the nationality of the corporation does not depend on a certain criterion, but on a combination of all the facts proper to attach it to a State. Those who thus restrict the application of the criterion drawn from the social domicile and confide to the judge the labor of seeking if this domicile, although real and effective, is not fraudulent—that is to say, contrary to I know not what numerous and divergent interests, necessarily indefinable and subjective because their determination is unconditional, since they compel him, the case happening, to fix the domicile of the corporation where it ought rationally to be in view of declaring it Belgian, French, or English, reach practically the same result as if they trusted themselves purely and simply to the impression of this judge for determining the nationality of the corporation. We know already that this result is as irrational as impractical.

Under this first absolute form the theory I have just refuted has not, as is seen, much solidity. Limited to a special and well-defined interest, that which presumes the nationality or the domicile of the subscribers or the members, it presents itself on the contrary with a great appearance of probability, "when the nationality of the subscribers is known, the country with which the corporation has the most serious liens is known, and to suppose that no other circumstance can furnish contrary indications, information is given con-

[a] Robin, Laws Governing Foreign Securities (thesis), p. 38.

cerning the domicile and consequently concerning the nationality of the corporation itself. If a corporation composed of French people places its seat in England, although the exploitation must be carried on in France, it is easily presumed that the members have used an artifice in choosing a territory which is neither that of their country nor that where they propose to work. Are they, on the contrary, English, the fixing of the social seat is easily conceived and one recognizes in the company the title that the organizers gave it." [a]

What M. Chavegrin says of the nationality of the subscribers, one of the speakers at the congress of companies in 1900 applies to their domicile—a fact more easy to verify.[b]

This theory is not completely confounded with that of M. Thaller which I have just presented; indeed, without imposing on the organizers the strict obligation of fixing the social domicile in the country where the subscription has been made, at least in those to which the subscribers belong, it leaves them the alternative of establishing this domicile either in one of these countries or in that where the operations which are the object of the corporation are pursued, but nowhere else, under penalty of being convicted of fraud. If it is a question of a personal corporation it would be fitting to seek what has been the nationality of the members who have signed the act constitutif. In order to lay it aside, we limit ourselves to a simple remark. We have already virtually rejected the restriction to which it pretends to submit the bearing of the fact which we have adopted as criterion. If corporations take the nationality of the country where they live and act, where the center of their affairs is, from whence issues the impulsion and the direction, where deliberations are made and decisions are prepared, where control is exercised, it is that they belong judicially to the State in whose domain their personality is thus manifested. Of little importance, once more, the motives which have been able to determine among the organizers the adoption of this seat, of little importance even the natural relation which seems to unite a certain one of these corporations to a certain other State, the consideration of the domicile ought to prevail over any other one, at least, we shall see it when this essential element is not neutralized by the will of the members combined with a most accidental element and manifested at the moment of the organization.

To oblige the parties to fix the social domicile in the place of issuance, or at the center of operations, is simply to make the social nationality depend on one of these two circumstances to the exclusion of that which we have adopted, it is to return by a detour to the

[a] Paris, November 4, 1886, S. 88, 2, 89, note of M. Chavegrin.

[b] Observations and amendments by M. Lebel, stenographic report, p. 368–370.

system of M. Lyon-Caen or to that of M. Thaller which I have refuted. We hold, then, to this definition of fraud alone applicable to our subject: The establishment of a fictitious domicile in a country other than that where the principal establishment of the corporation is effectually found, made with a view of attributing to this corporation a false nationality.[a]

V. Practical Application of the Autonomy of the Parties.

In justifying my preference for the opinion which determines the nationality of corporations by the place of their domicile, I have not concealed from myself its eventual insufficiency, and I have insisted upon the legitimacy of the usage necessary to be made of the choice of the organizers and the signers of the social act, for replacing this criterion or completing its indications. There can often be hesitation between many equally important centers, among which the direction and the administration are divided—difficulty comparable to the famous problem of the seat of sovereignty in the federative States or in those governed according to the principle of the separation of powers.

The organizers have at times, on the other hand, the most serious interest, that their corporation may have a nationality other than that of the country where it is domiciled and may depend for example on the country between whose frontiers it realizes its most important operations. The most equitable and rational solution is that which seeks, in the first case, to which of the sovereignties in presence, the organizers or the corporation itself have given the preference, and what validates their choice in the second. This solution is also the most judicial, for it is conformable to one of the most anciently established rules of international custom, that of autonomy. It remains to make the application of it in carefully distinguishing the one from the other of these two hypotheses.

The determination of the principal social domicile is a question of fact left to the appreciation of the judge and which the plurality of administrative seats will at times render extremely difficult to solve. I have previously spoken of a copartnership whose three partners, clothed with equal powers, direct, respectively, three commercial houses equally important in three different countries. Not

[a] It is under this hypothesis of a fictitious social seat that the following decisions were rendered, declaring null a corporation constituted in violation of the laws of the country of its real domicile. Swiss Federal Council, January 21, 1875. Journal of International Private Law, 1875, p. 80. Tribunal of Commerce of the Seine, August 27, 1891. Journal of Internationl Private Law, 1891, p. 1241. Cass. (Req.), December 22, 1896. Journal of International Private Law, 1897, p. 364.

less to the point seems the example of this company of tramways, whose meeting of shareholders and the council of administration sit at Brussels or London, while the delegated administrator, the council of supervision, the technical director, and a council of local administration operate in the country where its exploitation is carried on. In these cases it seems wholly natural to refer oneself to the choice of the organizers or even to that of the representatives of the company already constituted.

Let us pass to the second case, in which the autonomy of the will has opportunity to exercise itself. We suppose a corporation in formation whose principal organs of direction are found in a certain country and on which its organizers wish nevertheless to confer a certain other nationality. Have they the right? Is their choice limited; or can it be exercised among certain nationalities and then among which? Under what conditions? I have already answered the first of these questions. Upon one point the second offers no difficulties. The parties had no right to lay aside purely and simply the law by which the corporation is ruled in virtue of the place of its domicile; they could not acquire it by attributing any nationality whatever to this corporation. Their choice can be exercised only to the profit of one of the sovereignties to which the corporation is logically bound by one of its elements, others well understood than its administrative seat, perhaps the act constitutif, the capital or the subscribers, the members, the center of operations. Of these different facts, let us lay aside at first the place where the act constitutif has been passed and the nationality of the members. Very certainly, the organizers or the representatives of the corporation ought not to be allowed to determine its nationality contrary to its domicile according to one or the other of these two last facts, and that for a very simple reason. These facts, we have seen in the first part of this treatise, are capable of producing a relation of dependence between a corporation and a State only by the will, the intention that they imply among the members of establishing this relation. They have meaning only as manifestation of the autonomy of the will; it is then inadmissible that they can render efficacious and legitimate this same autonomy which would thus be to itself its own point of support. If the parties can be allowed to lay aside the competent sovereignty, it is on the condition of substituting another sovereignty with which the corporation has a natural relation and not a relation based on a fact which, insufficient in itself, is of no value except as an index of the will of the parties. Can this natural relation result from the fact that the subscription of the social capital has been effected in a certain country or that the organizers are there domiciled? I have already answered this question in the negative, and I have endeavored to show that

this accidental circumstance implies in no respect competency of the legislation and public power to which the territories are submitted, where it has been realized. It can, however, be supposed that the subscribers of the act constitutif of a corporation subordinate their contract to the adoption by this corporation of the nationality of the country where they reside, in the manner that it ought for example to be born French, English or never to exist, fault of capital. Without doubt, it will be ordinarily very easy for the organizers to place the social administrative seat in the country whose financial concurrence can be obtained and to attribute thus to the corporation the desired nationality, but a corporation can be supposed to be formed with a view of exploiting lands in Mexico with capital gathered principally in France, of the kind that the success of the issuance demands the assignment in the statutes of the French nationality to this corporation, although the necessities of the business demand the deliberation of the meetings of the shareholders and the council of administration at the center of exploitation.

WHY COULD NOT THE PARTIES ADOPT THIS COMBINATION?

The question is precisely to know if it is admissible that their will can freely confer on a corporation the nationality of a country to which it is united by no judicial lien. I have already answered at different times in the negative. The greater part of the rules enjoined by the competent sovereignty relatively to corporations are imposed on the parties who can not purely and simply then withdraw themselves from them and have the right to derogate from them by their agreements only on the condition of there substituting those which the rival sovereignty has established to which their company is bound, so as to assist by certain of its elements. At the point where we have succeeded, it is easy for us to designate this last.

Having thus proceeded by elimination and limited in succession the choice that we had recognized in principle to the parties, we find but a single nationality in favor of which this option can be legitimately exercised (we shall see under what conditions) to the exclusion of the nationality which proceeds normally for the corporation of its administrative seat—that of the principal center of exploitation.

Every corporation then puts on, as a general rule, the nationality of the country upon whose territory it has its principal administrative seat, but its organizers possess the power of giving it the nationality of the territory upon which is the principal center of its operations. The positive interest of the corporation will sometimes impose this combination. A very striking example is that of a corporation constituted in the single or principal aim of exploiting a concession

granted by a government which subordinates its grant to the adoption of its allegiance. As the necessities of the administration, of the deliberation, of the control demand that its domicile be fixed in a country foreign to that where it exploits this concession, this corporation will thus have a nationality distinct from its domicile. Why not? The choice here is in no wise arbitrary and is not presented, as in internal law, between a particular interest and the law, the jurisdiction, the competent authorities, but indeed between two sovereigns to each of which the corporation is bound in an unequal measure by certain of its elements. The consideration of this interest can then very legitimately join its own force to the attraction exercised by one of the sovereignties and render that one, feeble as it was, predominant.

But does it suffice for that an unconditional decision of the organizers? Will these exercise without restriction their faculty of option whatever may be the motive which has made them prefer the sovereignty of the place of exploitation to that of the social domicile? Would it not be possible to here utilize the theory met and laid aside in the preceding chapter which, in defining fraud a derogation of the normally competent law motived by the sole desire of withdrawing oneself from this law and not by a legitimate and serious interest, allows the judge to appreciate in a supreme manner whether the organizers of the corporation had an interest of this kind to establish the social domicile in such country, or, on the contrary, have been pressed to it only by a fraudulent intention. For refuting previously this theory, it was sufficient for me to point out the sophism upon which it rests, and which consists in attributing to the corporation one knows not what nationality different from its own, determined by various facts which I have enumerated, afterwards to seek if its organizers were interested or not in clothing it with its proper nationality, the sole one that it possesses, and whose only generative fact is the domicile. Is it not contradictory?

At the point where we have come, is not this definition of fraud exact and admissible? The situation is not at all like that before presented. It was then imagined to withdraw the corporation from the State to which it judicially belonged under the pretext that the founders had organized this dependence in order to defraud one knows not what other States. This was illogical and arbitrary. It is pretended now to maintain it in the domain of this domestic State and allow it to depart from it only in consequence of a consideration drawn from its own interest. The objections heretofore raised have here no more bearing. We have, indeed, determined the nationality of the corporation by the consideration of its domicile in recognizing in its founders the power of conferring on it the nationality of its

center of exploitation. Is it not fitting that this exception be justified intrinsically that it have a sufficient judicial reason? And can this name be given to the desire of withdrawing the corporation from the laws of public order, from the authorities, from the jurisdictions of the country where it lives and acts, often perhaps contrary to the evident interests of this company and to those of third parties?

The autonomy of the parties will be thus doubly limited; in its choice, for it can bear only upon the nationality of the center of operations; in its motive, for it can be motived only by an interest whose legitimacy ought to be supremely appreciated by the judges. Must we admit this second limitation by the same right as the first? I should almost be tempted to think in this way although I am well aware of the difficulty that the determination of an element so subjective as the intention of the parties and that of a fact so vague as the legitimate interest of the corporation offers.[a]

That which makes me reject this first impression is not only the difficulties of application, the contingency, the arbitrariness of the solution toward which it inclines, but especially this consideration, which can not be too much insisted on, that the corporation depends in a serious measure on the State between whose frontiers its principal operations are executed. This relation is less important without doubt than that which binds this corporation to the State of its domicile by a veritable appurtenance from which results the greater part of the effects of allegiance; it is sufficient nevertheless that the will of the parties to transform it in subjection can never constitute a fraud.

On further consideration the most judicial and at the same time the wisest opinion—because it is the most simple—and that which allows the least place to arbitrariness, seems to be to allow the parties to choose without restriction between the nationality of the domicile and that of the exploitation, the first remaining that of the company in the absence of such an option.[b]

The necessity of this restricted option left to the parties has been well understood by MM. Lyon-Caen and Renault, who modify thus the application of their criterion, drawn, it is known, from the center of exploitation in allowing the founders to attribute to the corporation the nationality of the country where it has its center of direction.

The system conceived by these eminent authors differs then from

[a] Can it be maintained, for instance, that a corporation possessing the nationality of the center of operations may legitimately pretend to have an interest in escaping the taxes levied only on national corporations in the country where it has its domicile?

[b] See the report of M. Lyon-Caen at the session held in Hamburg in 1897 by the Institute of International Law. (Yearbook of 1891–92, p. 160.)

that which has just been presented in that one establishes as a rule what the other leaves to the choice of the parties, and reciprocally. Moreover, this concession made by them to the autonomy "supposes necessarily that there is no fraud on the part of the founders." [a]

It is to be regretted that the limited work of MM. Lyon-Caen and Renault has not permitted them to define what they meant by the word "fraud." So far as they shall not have justified it, it will be allowed to remove the serious restriction thus laid upon the choice of the parties. It is that which the members of the congress of joint stock companies thought, who, however, adhered by their votes to the theory formulated in the following terms, by M. Lyon-Caen and by one of the speakers: "The nationality of a joint stock company ought to be determined by the country where it has its principal establishment or by the country of its real social seat, fixed by the statutes." [b]

It is seen the terms of this formula being reversed there is obtained in résumé the solution that I have proposed. Both are in accord at least in that they recognize the same value in the autonomy of the parties.

It remains to know by what means this autonomy ought to be practically manifested in order to be admissible and produce its results. How, in other words, is the choice of such social nationality determined and proved by the first shareholders in the case where they could exercise it?

To answer this question, let us distinguish again the two hypotheses in which the insufficiency of the criterion of the social nationality is capable of being completed by the choice of the parties. In case of plurality of administrative seats, these can, we know, make the nationality of the corporation depend on one or the other of the establishments of equal importance between which one hesitates to find this seat. They can yet, I have just shown, prefer legitimately the principal center of exploitation to the social domicile for making of it the base of the social nationality.

In this last hypothesis their option is particularly important, for it does nothing less than to check the normally competent sovereignty. In the silence of the statutes, neither the associates nor third contracting parties could be withdrawn from the protection of this sovereignty under the benefit of which some have entered into the company and others have dealt with it. In order to be valid this choice ought then to be expressed in the act constitutif.

Concerning only the determination of the veritable social seat which the plurality of establishments of the corporation renders doubtful

[a] Lyon-Caen and Renault, Treatise on International Law, Vol. II, pp. 824–825.
[b] Stenographic Reports, p. 317.

and ambiguous, it can, it seems, in the silence of the statutes, be referred to the corporation itself acting by its founders, its first members, indeed, after its foundation, by its representatives, and seek in the personality, the acts, the declarations, the attitude of some and of others, what is the establishment which they have, at least in all likelihood, considered as the seat of this domicile, the nationality which they have believed to belong to their company.

Indeed, every domicile, as well that of corporations as that of individuals, is constituted by the combination of two elements; the first, material, which depends, we well know, on the founders and is realized in each of the social residences in presence, all supposed of equal importance, in such a manner that it is in the case insufficient for itself; the second, voluntary, which is the choice made of one of these residences by the corporation for there establishing its domicile, choice capable of resulting from many facts and of manifesting itself under no matter what form.

It now seems time to appeal to the circumstances which I have rejected as insufficient in themselves to establish the social nationality, because they are of no value except as signs of the choice of a nationality by the corporation, in declaring that by this right it would be, perhaps, the case of utilizing them in the application of the rule of autonomy. These circumstances are the place where the act constitutif has been concluded, the judicial forms according to which it has been passed, the country of subscription, the nationality or domicile of the primitive members, of the subscribers, or of the founders. They could not be invoked there where the will of the parties has not been admitted to exercise itself and have not consequently any direct influence upon the determination of the social nationality; they can, on the contrary, very legitimately serve to manifest to the profit of such residence, the existence of the *animus*, essential condition of the domicile. The judge will have to seek them, to compare them, and discover, by means of this examination and this comparison, that one of these centers of affairs which the corporation has regarded as its veritable seat. Delicate and perilous task, but the accomplishment of which will often render easy the possession of the condition exercised by the corporation in the course of its existence. Has it been presented as bound to the legislation, as submitted to the authorities and to the jurisdictions of one of the countries where it possesses one of these residences which we suppose of equal importance; has it on divers occasions acted accordingly, the law will be applied to it, the case occurring, it will be submitted to the authorities or to the tribunals of the country of the residence which its will has raised to the dignity of domicile.

Thus will be applied in this hypothesis, happily very rare and rather theoretical, which at first seemed to exclude it, the rule according to which the nationality of a corporation is established—save the exception resulting from the statutory designation of the center of affairs—by its social domicile.

VI. Concerning the Change of the Corporate Nationality.

Like individuals, corporations are sometimes interested in changing their nationality. Can they do so, and in the affirmative, under what conditions? What are the results of this change? These are the questions to examine.

It is now seasonable to test the ideas previously separated and relative to the determination of the nationality of corporations. If they are correct, the problem that we now approach will be easily and quickly solved.

Exercising its activity, pursuing its aim upon the territory where it thinks, wills, and acts by its representatives, the corporation lives under the authority, the legislation, the jurisdiction of the State which rules this territory, and belongs thus to it by a lien of appurtenance and of dependence—real subjection. Its nationality is not, however, absolutely inseparable from its domicile, as those contend who confound the one with the other; it can, on the contrary, we have seen, be fixed by the founders, according to the situation of its principal center of exploitation.

The logical consequence of these propositions is, on one hand, that the removal of the domicile of the corporation from one country into another, or the annexing of the territory which serves for the seat of this domicile, changes *ipso facto* its nationality to the profit of the State in the sovereign domain and under the protection of which it henceforth lives, and, on the other hand, that the same result is produced by a modification of the statutes connecting the corporation to the State upon whose territory its principal center of affairs is placed.

Against this conclusion two objections are raised, drawn, one from the notion yet current of the judicial personality, the other from the spirit of different positive legislations, justified by the interest of the parties and that of third parties.

The first can be expressed as follows: Artificial persons have their existence from the law under the benefit of which they have been founded and from this law alone. Without the provisions which create their personality in organizing it upon the plan of a fictitious life and sustain it thus in each of its manifestations, they are a pure nothing. If, then, one of them claims to escape from it to enter into the domain of another legislation, this can be only at the price of its

existence. It is necessary first that it enter into nothingness from where the legislation it has preferred will summon it by a new *fiat*. More simply, a corporation desirous of changing its nationality must be dissolved and proceed to its liquidation and its distribution, after which the members will reorganize it in giving it a new nationality.[a] Impossible, then, to conceive a change of nationality operated to the profit of one corporation there where it could concern only two successive corporations, the one recently dissolved, the other newly constituted, which pursue the same end in conditions analogous to which are submitted nearly the same members.

"The right of individuals to change their nationality is understood, for it results from the nature of things; the physical person has a life of his own, independent in itself of the political society to which the chance of birth has admitted him. But it could not be the same with the artificial person, fictitious creation of a certain legislation. If it breaks the lien that holds it to the law from which it has received its existence, it disappears."[b] * * *

These metaphysical subtleties are the fruit of ideas more and more abandoned. Far from defining imaginary beings as pure legal fiction "without rights or real obligations"[c] "which the law establishes, modifies, suppresses,"[d] at the will of those who make it, now is seen the realities preexistent to the law which has recognized and ruled them, manifestations of the human activity which the legislator could not disregard without injustice and which he ought by no means to consider as abandoned to his unrestrained will, influenced by the necessities, the political passions of those who have chosen him or those who inspire him. That which constitutes a corporation is a permanent substance on which positive laws impress such or such form. It can then be conceived that without ceasing to be itself it can take a new form, change its judicial attributes and its personal statute, in a word, throw off its nationality for putting on

[a] Aix, Jan. 30, 1868; Sirey, 68, 2, 343; Cass., June 17, 1880 (Journal of International Private Law, 1881, pp. 262-263); Court of the German Empire, June 5, 1882 (Journal of International Private Law, 1883, p. 315).

[b] Pineau, on Commercial Corporations in International Private Law. To the same effect, Vavasseur on Corporations, sec. 957. The aforementioned sentence of the German court expresses the same idea under a slightly altered form. "If corporations of German origin which establish their seat abroad lose their rights, this is solely because the loss of their nationality, if it may be thus expressed, necessarily involves for them the loss of the privileges which this nationality conferred upon them. Hence the transfer of a social seat to a foreign country produces the same effects." (Journal of International Private Law, 1883, p. 316.)

[c] Laurent, Civil Law, Vol. I, p. 389.

[d] Ibid., loc. cit., p. 370.

a new one. Could there exist in positive law any provision opposed to the exercise of this power? It is upon this ground the second objection is founded. When, one may say, the different positive legislations rule the constitution, the operation, the dissolution of corporations, they regard only the case of a corporation which may be founded, and not that of a corporation already organized, conformably to the provisions of a foreign law from which its members are desirous of withdrawing it. In this respect there is nothing comparable to naturalization, and one can only felicitate himself thereupon. What, indeed, signifies this change of nationality which is supposed to be permissive? Simply that the corporation continues to enjoy its personality such as its preceding domestic law has established it, the judicial form and personal statute which proceed from it in profiting from the time of its denaturalization, by its new personal law. It is thus that it could validly operate in France with a partially subscribed capital, divided into shares below the minimum legal rate without having had its shares of capital duly verified, in presenting itself as French and in acting in this quality. Is such a claim admissible? Can one conceive of many kinds of domestic corporations different by their respective personal statute, some—those which have originally acquired this right—to which the domestic law is applied absolutely and in all its rigor, the others those which have obtained it by a simple transfer of the social domicile and which have thus more or less completely avoided the most annoying provisions of this law of which, however, they invoke the benefit? This inequitable, strange, but very logical result of the change of the social nationality justifies the silence of the different positive legislations in respect to this combination not less than the interest of third parties who have dealt with the corporation upon the faith of its primitive personal statute. These could not suffer by a change in the situation which they have anticipated; they ought not to be opposed by a change of jurisdiction, of conditions of liquidation or of division, a prescription other than that which they had foreseen at the moment of contracting. Yet, again, the corporation is a contractual relation; when a nationality is assigned to this abstraction convenient terms are used to designate the ensemble of the legal imperative or suppletory provisions which rule this contract and its effects. The accord of wills once established, its result could not be modified by one of them, a new legislation could not be substituted for that of the contract, for this would be to substitute a new corporation for the old one.

This second objection supposes a persistency of the primitive social law, perhaps exaggerated, whose legitimacy we will discuss at the

proper time. In every case it proves too much in order to prove what it is. The result which it condemns is indeed not more inadmissible than the greater part of the rules of private international law. This part of judicial science is based upon the respect of acquired rights in the domain of a foreign law. This grand principle of respect for acquired rights often occasions the concurrence of many legislations and thus obliges the judge to validate acts prohibited by the law of the territory upon which he distributes justice, and to recognize institutions less rigorous than those established by this law. It is that which is produced here. The rights acquired by the corporation under the empire of its original nationality are maintained to it without this survival hindering it from profiting by the advantages which result from its new nationality. Nothing more natural; the laws have no retroactive effect, as all that which the corporation or its founders had accomplished under the benefit of the provisions of the law to which it was previously submitted must be secured to it by the new one. In order to be able to declare, as one does, this solution absurd and antijudicial, it would be necessary to have some other argument than the silence of positive legislations. The same absence of provisions is remarked on the subject of almost all the customary international rules, whose existence is nevertheless not in doubt. Let no one speak further of the right of third parties and of the immutability of the corporate contract; here yet one would prove too much. We shall see a little further on what is to be thought of this last consideration; as for the first, it might be as properly invoked for declaring unopposable to third parties either the transfer of the domicile of an individual from one country to another, or even the change of a personal statute consequence of a naturalization. It is evident that these acts, manifestations of an incontestable right, are effective in the future *erga omnes* and that the creditors have only themselves to blame if they have relied upon the faith of their debtor, individual or corporate.

These objections of principle laid aside, it is fitting to ask oneself under what conditions is subordinated the substitution, by a modification in the statutes of the corporation already constituted, of the nationality from the center of affairs to that of the social domicile, or the transfer of this domicile from one country into another, both of which facts produce this change. The realization of this change seriously modifies the condition of things whose consideration by the members at the moment of their entrance into the corporation ought to have determined this adhesion.

CAN IT BE IMPOSED ON CERTAIN ONES AMONG THEM?

In the case of a partnership or a limited partnership with dormant partners it would certainly be necessary, in the silence of the statutes on this subject, to have the unanimity of the members severally and jointly liable, since all enjoy, save by contrary partnership articles, equal powers and each of them has the right to act on account of the company and to oppose an act of this kind made by his associates.

Ought unanimity to be yet required of the associates severally liable to the amount of their shares of the capital?

"The general rule for all corporations is that the statutes can be modified only by the unanimity of the associates, for all have consented to the fundamental parts in the meaning which has been given to them; they have not consented to any other thing and can not be obliged to any other thing without their consent. The majority could suffer only if the modification has been authorized by the statutes under these conditions. It is conceived that there was not then in substance a modification in the first agreement, but rather an application of this in one of its special provisions. And yet it would be necessary that the modification might not have affected the essential foundations of the corporation or, indeed, that this modification might have made the subject matter of an express and formal mention of the statutes." [a]

This opinion, strict deduction from the judicial principle expressed in article 1134 of the Civil Code and sustained by some eminent writers, has inspired jurisprudence until a recent date.

For some years a solution more conformable at once to the necessities of practical life and to the real will of the parties seems to have prevailed. The tribunes distinguish the modifications which affect the essence of the company from those relative only to its accidental elements. "The essential parts of the social act ought to be observed," affirms Advocate-General Homar,[b] but what is to be understood by this expression? The learned magistrate enumerates the *raisons d'être* of the contract of the shareholders relative to the object or the cause of this contract—aim, duration of the corporation, payment of the capital, distribution of profits. Since then jurisprudence has always tended to give to this formula and its synonyms a less restricted meaning; it is thus that it validates at present the increase or decrease of social capital consented to by the meeting of the shareholders. Without entering into the examination of this problem, let it suffice me to recall the magisterial and truly decisive solution given to it by M. Thaller.[c]

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[a] Note of M. Boistel, under Paris, December 6, 1891. Dalloz, 1892, II, 385.

[b] Paris, April 19, 1875. Dalloz, 1875, II, 161.

[c] Dalloz, 1893, I, 103. Note. See also Dalloz, 1894, I, 313. Note of M. Desjardins, under cassation, January 29, 1894.

The corporation, represented by its different organs, notably by the meeting of shareholders, exists, not only in respect to third parties, but also relatively to the members. M. Thaller has thrown upon this interior aspect of the social personality a vivid light, thus dissipating the obscurity in the shade of which the statutes are likened to an ordinary contract. Indeed, the dissenting majority of the shareholders ought to yield to the decisions of the corporations represented by the majority of the meeting, this not being a simple juxtaposition of members, but a real organ, animated by a corporate existence.

Once established that this kind of "assembly in which the shareholders are absorbed" can modify the statutes, even in the absence of any clause of these authorizing this change, it follows that this power is not unlimited. What are its limitations? Are they opposed to the validity of this transfer of the social seat not unanimously consented to?

First and foremost, in ratifying in advance, at the time of their entering into the corporation, the decisions of the general meeting, the shareholders have in nowise intended to make a complete abandonment of their rights, but have naturally reserved those which the social contract could not disregard without being reversible; the deliberations leave such rights untouched. Moreover, the statutory clauses truly essential could not be affected whose change would cause a modification of the object or the judicial type of the corporation, which would thus lose its identity in becoming a new corporation.

If, as I think, these deductions are correct, the transfer of the social seat abroad does not necessitate the unanimous consent of the members, but only that of the majority requisite for modifying the statutes. There will result, it is true, from this transfer to the corporation a change of nationality and personal law—in other terms, different conditions of operation, but not a loss of identity, the consequence of a transfer of its personality being given at least the community of principles which reconciles the provisions of the different legislations on this subject.

This solution offers no difficulty when applied to a denationalization, consequence of a transfer compelled by needs of the business. Such was the case in the two most recent examples relative to which the question of social denationalization was brought before the tribunals. In the first [a] a company of coal mines had transferred its domicile from France to Belgium, where the mine, object of exploita-

[a] Cassation, Nov. 26, 1894 (Dalloz, 1895, I, 57); Amiens, chambers in session, June 29, 1895 (Journal of International Private Law, 1897, p. 158); Cassation, March 29, 1898 (Journal of International Private Law, 1898, p. 758).

tion, was situated. In the second[a] a company organized for exploiting tombac, essentially a Turkish product, whose monopoly had been secured to it by the Ottoman Government, had equally decided to transfer its seat to Constantinople. The interests of the company, well or poorly understood from a business point of view, had, without doubt, in both of these cases, been the reason of these decisions. But let us suppose that they might have been moved by the sole desire of changing the social personal statute; for example, with a view of enlarging the powers of the administrators or of issuing some bonds according to less severe conditions. Could not such a decision, inspired by such motives, be declared fraudulent and consequently void? This question has already been elucidated at two attempts relative to the choice of a social domicile made by the founders and of their power to determine the nationality of the corporation according to the situation of its center of affairs. It is therefore useless to now reproduce the arguments then developed. Let it suffice to recall that the will to change the personal statute of the corporation, in realizing the desired conditions in order to acquire a new nationality, is simply the exercise of a right.

The corporation imagines that it would more easily attain its object if it was ruled by a new personal law; its representatives realize therefore the desired conditions that it may acquire a new nationality and by the same stroke a new personal statute. What more legitimate? There would be fraud only if the corporation simulated the transfer of its domicile to the foreign country or adopted the nationality of a country in there supposing a center of exploitation that did not there exist.

Denationalization once effected, following the conditions which have just been indicated, confers on the corporation all the rights and imposes on it all the obligations of its new nationality.

This idea is easily realized when it is a question of applying to the corporation the rules of its new legislation which affect in no respect its condition, its capacity, its acts in the past, or the future effects of its organic agreement. It is thus that it will be henceforth justifiable before the tribunals and will contribute to the taxes under the same conditions as other domestic corporations. The difficulty begins when the measure is sought according to which its condition and capacity are modified by the denationalization.

NOTE.—The following are the rules governing the formation of French companies (corporations):

The company act can be authentic, or privately signed, and in the last case it is sufficient that it be drawn up in two originals, one annexed to the dec-

[a] Consular Court of France, at Constantinople, Sept., 1899 (Journal of International Private Law, 1900, p. 657).

laration that the founders have to make before a notary previous to the constitution of the company, the other deposited at its social seat (headquarters).

In order that the company be legally constituted, the following condition must be observed: (1) The minimum par value of each share must be 100 francs if the capital exceeds 200,000 francs, and 25 francs in other cases. (2) The capital must be entirely subscribed. The subscriptions must be real and unconditional. (3) Shares of 100 francs must have a quarter of each paid in; shares of 25 francs must be wholly paid in. (4) The founders must declare before notaries that the whole subscription has taken place and that the shares are paid in according to the law. To this declaration must be annexed one of the original acts of corporation privately signed, or a copy of the act that has been drawn up by a notary other than the one who received the declaration. (5) The meeting of shareholders must examine if this declaration is correct. (6) When there are shares of capital in specie or stipulations of peculiar advantages, the value of these shares of capital or the stipulations must be approved by the general meeting of the shareholders; if not the corporation remains without effect. Those who have made these shares of capital or those to whom the profit of these stipulations have been made can vote. (7) A general meeting must nominate one or more administrators. (8) It is necessary that one or more commissioners of general supervision should be chosen for the first year. (9) The members or shareholders must be at least seven.—W. E. S.

There could evidently be no question of affecting acts made under the control of the former legislation, the new having no retroactive effect.

There is no more question, after having respected the personal statute of the corporation in its manifestations before the denationalization, of obliging this to radically transform this statute in order to render it in all points conformable to the provisions of the actual domestic law, substituting thus a new corporation for the old one and disregarding all the conditions to which the members have subordinated their entry into this last one.

The question is to know if the organization of the corporation ought not to be modified upon certain points, if the formalities complied with according to the former law for assuring the validity of its constitution ought not be renewed at least partially, if, finally, the social act can continue to produce, however indistinctly, all its effects, even those which are contrary to the imperative or prohibitive rules of the law by which the corporation is ruled. It is extremely complex. For answering it in a satisfactory way, let us take an example and suppose a joint-stock company whose administrative seat is in England, while its center of exploitation is in France. This company is English, but it complies with the necessary conditions to become French. It takes advantage, then, of this power and introduces into its statutes a clause expressing this option. In this respect the English law is extremely liberal; it neither requires the whole subscription, nor the payment of a quarter (at least unto the amount of 25 francs), nor the division of the capital into

shares of a minimum sum, nor the verification by a general meeting of the shares of capital in specie and particular advantages, nor the nomination of a council of supervision, all obligations imposed by French law, under penalty of nullity; it is satisfied with a registration at certain public offices of the statutes and a memorandum signed by at least seven associates.[a]

It might be said—it is even the idea which is at first brought to the mind—that the French law ought not to be applied retroactively, and that there is an acquired right for the company to remain organized, to continue its function, and even to be dissolved according to its original law, because the acts accomplished under the empire of a legislation are, in principle, valid before the jurisdictions of all countries—rule that expresses very clearly the adage *locus regit actum*. It would be, then, according to the primitive social law that the validity of all the facts relative to the company ought to continue to be appreciated and that these should still produce their consequences.

On consideration, this solution appears unacceptable. Among these prescriptions many have been imperatively imposed on companies which function in France, because the French law has found them necessary in the social, economical, judicial conditions of this country, of the kind that their *raison d'être* exists by the single fact that a company is French. It remains to know which of these prescriptions pertain to the public order.

I have the impression that the former English company must conform, within fifteen days after its denationalization, to the formalities provided by articles 55 and following of the law of July 24, 1867, excepting that which pertains to the shares of capital in specie and stipulated advantages, these not having to be verified, as can be seen. These measures of publicity are prescribed relatively to all French companies without distinction, and their *raison d'être* exists just as well when the company has realized, after its organization, the conditions required that it may become French as when it is born provided with this nationality. I will say as much of the subscription of the whole and of the payment of a certain proportion of the social capital. There can, however, be some doubt on these two points. Have not these rules been exclusively imposed in the interest of the subscribers, and the subscription having taken place in the domain of a foreign law, ought it not always to be held as validly done in the result? It is the contrary that seems true. The exigencies of public credit which have prompted such provisions survive to the

[a] Companies act of 1862, sec. 4. Consult, on joint-stock companies, the excellent manual of Jordan and Gore-Brown.

subscription. Would it be admissible that third parties who have dealt with the company on the faith of guaranties established by the French law should be opposed by a foreign law whose previous applicability they might have legitimately been ignorant of? The organization of a council of supervision is imposed for the same reason. It is besides very easy and is not susceptible of any serious inconvenience. It is otherwise with the verification of the shares of capital in specie and the minimum sum of the titles. The *raison d'être* of these rules is the protection of the parties to the organic act, the maintenance of the regularity and honesty of their agreement. The protection of the capital of the place of subscription comes only in the second rank; also the titles in question if they are admitted to circulate in the countries which oblige domestic companies to be organized with titles of a higher minimum rate. It is to say that it is nowise necessary to impose on the corporation a revision of shares of capital in specie issued, perhaps, since a long time from its funds and a decrease of the number of these titles combined with a raising of their sum, measures very difficult to be realized and probably more disadvantageous than useful.

Thus completed and reorganized under this somewhat hybrid form, the former English company will enjoy the capacity that its new personal law confers on it. It is according to this law that will be measured from its denationalization the powers and the responsibility of administrators, agents, liquidators.

However, these last will be obliged, evidently, in the silence or the insufficiency of the statutes, to follow the rules of division contained in the legislation to which the corporation was submitted at the moment of its organization. These are only the forms and the procedure of the dissolution, of the liquidation, and of the partition which will be determined by the new law.

VII. Nationality of Associations and Endowments.

Until now, for greater clearness, in order to present and refute more easily the theories elaborated upon this subject, I have reasoned, as has always been the case, in considering almost exclusively corporations. It is now time to apply to other artificial persons the ideas thus freed and the rule that proceeds from them in seeking what is the nationality of associations and endowments. The interest in the question, I have already said, is the same under this new aspect as under the preceding one. We shall see, however, that it is more limited, the territorial law having in this hypothesis a larger extent. Under this form the problem admits, at first view, of the same solutions, although its ideas may be slightly modified. The corporation,

the association, can, it seems, belong logically either to the State which has recognized, authorized, incorporated them, or to the State upon whose territory they have been organized, or to the State whose founders or their administrators are themselves the subjects, or to the State to which they belong by their principal center of activity.[a]

For the reasons that have been hitherto expressed at length and which can here be used again almost without change, it is the last of these solutions that must be accepted, to the exclusion of the others and after having combined the two alternatives of them, as I have done. In principle the association or the endowment takes, then, the nationality of the place where its organs of direction and of administration are situated; it enjoys, however, the power of adopting in its statutes the nationality of the country within whose limits it pursues its aim materially and especially, supposing, however, that its object can be located upon a territory.

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[a] Let us add, in order to be sure of having neglected no combination, that the association or endowment, having by definition an ideal aim, there can result for it, with a State, a relation in which might be seen a lien of appurtenance sufficiently strong to constitute its allegiance. The raison d'être of the endowment or the association is sometimes the grandeur and the prosperity of such a State, the welfare of a collection of indviduals whose nationality has prompted this benevolent intention from which the work has gone forth. An association with patriotic views (League of Patriots of the French Country, for example), an institute founded to propagate the French language and ideas, would be of French nationality. The artificial person with an ideal object would thus belong to the State in whose domain its final cause would attach it. And the nationality of imaginary beings would be determined according to two different circumstances, whether or not they were proposed for realizing benefits.

This conception is too evidently contrary to the essential character of the sovereignty to need refutation. In order for a corporation to depend upon a certain State it is not sufficient that some more or less vague aspirations float it toward this State, a circumstance which is moreover very rarely realized, it needs that it be exercised in its territorial domain. The difference of object and aim which separates corporations from other imaginary beings is moreover more apparent than real. Both are constituted for the interest and welfare of certain individuals. Could not corporations be found organized with a view of realizing works that could be called patriotic, in that they interest a certain State, like companies of colonization or navigation, companies for giving information, etc.? Why not apply this criterion to them?

However, in countries where the western idea of the condition and its essential attribute, the territorial sovereignty, is imperfectly realized—for example, in the countries called capitulatory—it would be perhaps possible to appeal, at least subsidiarily, to the theory which has just been indicated, as well as to that which determines the nationality of artificial persons by those of their numbers. Indeed, many associations formed among foreigners in the Ottoman Empire are foreign. Some works have there been constructed in establishments of public utility or in artificial persons by decrees of foreign governments, which have taken into consideration the object to be presented by them in order to provide them with the judicial personality.

The reasons which have made me adopt this double criterion exist, indeed, as well in respect to associations and endowments as to corporations. It has seemed to me, in order to determine the sovereignty on which these depend, to be fitting to attach oneself to the conditions according to which their activity is exercised. If the corporation lives, acts in the sovereign domain of a State, it is to this State that it ought to belong by its subjection. Why should it not be the same with associations and endowments? The doctrine, and yet more, the different positive legislations, separate this kind of imaginary beings from the preceding one by a rule based on a very accidental character, in which the majority of writers pretend nevertheless to see an essential element. According as the aim pursued by it is or not lucrative, the imaginary being is submitted to conditions of organization of very different capacity and activity, some large and liberal, others generally strict and inspired with a mistrustful, sometimes even hostile spirit.

From the social point of view which now engages us, this distinction offers but little interest, whatever may be the considerations ordinarily invoked in its support. In both of these applications the notion of judicial personality represents the same reality, that of rights exercised collectively by an ensemble of individuals, known or unknown, who take a more or less active part in the business, some participating at once in the contribution, in the administration, and in the benefits; others, for example, the dormant members, contributing and enjoying, but not administrating; others finally—this is the case with the beneficiaries of an endowment—enjoying purely and simply. When it concerns a corporation the benefits are material and their privilege passes to the members themselves. They are on the contrary intellectual and moral when they result from an association or an endowment and third parties profit of them, sometimes alone in the first case, always in the second.

Yet again these differences, very important, practically speaking, present nothing essential; they hinder in no respect the application of the system that I have adopted in respect to corporations to the determination of the nationality of associations and endowments; at the utmost they give rise in this application to some difficulties more apparent than real which apply both to the rules of public law generally followed, of which I have just spoken, and to the object often ideal and universal of judicial persons whose ultimate object is other than gain.

A strong unity of action characterizes corporations whose object is purely material. They can not change from a single center, where decisions are formed, from where impulsion goes forth, where benefits in view of distribution are centralized. This last operation, which is the *raison d'être* of the corporation, capable of being accomplished

only in accordance with a single and the same rule, all social establishments, whatever may be their situation and the conditions of their function, form only the parts strictly bound of a same whole, to which a single law is applicable, law which rules in all countries the constitution, the operation, the dissolution, the division, and which administers in principal the jurisdiction of the social domicile.

International custom recognizes and sanctions this unity of law and jurisdiction; in a word, this social personal statute. This universal recognition is, moreover, facilitated and justified by the similarity of rules judicially imposed with respect to this subject by the different legislations which admit nearly the same types of corporations.

Associations have by no means need of this unity of action and direction. The lien that binds the members and hinders the artificial person from dissolution is purely ideal, consisting simply in a community of aspirations, of beliefs, of ideas, or of tastes, manifested by a common effort; it is not altered by the diversity of groups formed according to variable material conditions by these members in view of efficiently directing their efforts in the same direction. These groups, kind of associations within the associations, can be very well ruled by different laws without ceasing to be the molecules of the same body and constituting a single association. It is thus that the conception of an association provided with as many domiciles and nationalities as it comprises groups formed in different countries is not at all contradictory. Such is the case of religious congregations, of Free Masonry, of some scientific companies.

Each lodge or each convent leads a distinct judicial life, is submitted to a different personal law, although, by its rule of conduct and its actions, it may be in entire communion with the collection to which it belongs. One can not, then, conceive in French law, in respect to artificial persons (and the other western legislations ought, we think, to impose the same solution) the possibility of the problem which has heretofore engaged us and which I have solved in making appeal to the autonomy of the parties, that of a plurality of social seats of equal importance, from which would result for the corporation many nationalities if its founders or its representatives had not necessarily chosen one of them in an express or tacit manner. This difficulty, very embarrassing, is not raised here—as many groups, so many different nationalities.[a] It is not more to be conceived of an

[a] The court of cassation of Rome had occasion to proclaim, in a decision cited by the Journal of International Private Law, 1890, p. 739, "That a religious order, though possessing a universal character, like that of the Jesuits, could not be, from the standpoint of civil-law relations, considered and treated as constituting an universal moral person. * * * Consequently, in all that concerns the acquisition or the possession of property, the order of the Jesuits resolves itself into as many juridic personalities as there are states in which it is recognized."

association which, meeting in France, would be foreign because it would obey an impulsion which comes from abroad. This association will be considered as domestic, and ought to be conformed to the French law.

Thus the public law of the State demands it upon whose territory it pursues in its domestic sphere, the aim common to all the parts of this collection, strictness motived by the disfavor that imaginary beings of nonlucrative aims inspire, as much as by the diversity of rules imposed in each country relatively to their constitution, to their function, to their capacity, to their dissolution.

This diversity is known especially in respect to an endowment. French law almost entirely ignores this notion, or, rather, "it modestly slips it into the realm of donations."[a] We have left off at donations *sub modo* * * * instead of giving to a church or an abbey, one gives to a commune (it would be more exact to say to a corporation). * * * The German doctrine * * * has arrived little by little to the notion of an independent patrimony, constituted without its being necessary that it be confounded with the patrimony of an artificial person already existing; it is the patrimony itself which becomes an artificial person. * * * The endowment becomes a patrimony existing in view of accomplishing one aim. * * *[b] The learned writer could have added that in fact this conception is actually realized in France as well as in Germany. "The State," observes M. Truchy,[c] "recognizes as an establishment of public utility works that do not rest upon an association, works that are constituted simply by a certain capital designed for any aim whatever, endowments in the most technical sense of the word." And he cites many examples that have since accrued. Nothing remains unless the conditions of constitution, of function, and of suppression of establishments of public utility differ seriously from those which are provided by articles 80–89 of the German Civil Code. That which M. Saleilles of the German Stiftung says is better yet applied to the English trust or the Mussulman ouakf. These are, in all the meaning of the term, endowments which enjoy an independent per-

[a] Geouffre de la Pradelle, On Endowments (thesis), p. 8. The author justifies by sound reasons this procedure, which is "more dull, less picturesque, than the second," but, according to him, more simple, more practical, and more regardful of real conditions. The experience of several years seems, however, to place him in the wrong. Many endowments independent of any association are now operating in France, where they are giving excellent results.

[b] Saleilles, Study of the theory of obligation, 2d ed., p. 151. (See the German Civil Code, art. 80–88.)

[c] Truchy, On Endowments (thesis), p. 159.

sonality,[a] in which is, so to speak, "crystallized" the will of the founder, a personality represented by the administrator (trustee of the trust, nazir of the ouakf) to the profit of its beneficiaries.

In what measure, under what conditions, are these different forms imposed on this will when it concerns an international subject? In speaking only of the French law, an establishment destined to operate upon the territory ought necessarily to be constituted and administered conformably to the domestic law; it could not be considered as foreign under the pretext that it is directed by a committee that sits abroad. Perhaps, for example, a trust established in London for carrying on in Paris a public library of English books or a British free hospital. In France, at least, this establishment could only be French; it ought to be organized and administered according to the forms, the conditions, and the rules of the French law.

This strictly territorial character of the provisions relative to artificial persons with an ideal object reduces singularly the practical interest of which the determination or the change of their nationality is susceptible. A company can very well, we have seen, possess establishments and even its principal center of exploitation upon the territory of a State of which it is not the subject. In like case the branch of the association or establishment of the endowment fixed upon the territory of this State will be, on the contrary, considered purely and simply as domestic in the limits of this territory. Let us add, in these limits only.

Upon a third territory, the judicial rule which determines the nationality of the imaginary being by the consideration of its principal administrative seat will be applied, and the artificial person will enjoy, in all countries where it is fixed, one and the same nationality, one and the same statute, that of this general domicile, save, well understood, if the lien which binds the domestic branches of the association or of the cosmopolitan endowment is purely ideal of such sort that they enjoy, respectively, a material organization absolutely distinct and independent, and thus constitute, judicially speaking, many endowments or distinct associations.

VIII. Character of this Essay—Conclusion.

Perhaps the reader has been struck by the systematic and somewhat abstract character of this treatise. A place has been given it in jurisprudence and positive laws whose insignificance will, perhaps,

[a] Strictly speaking, neither the trust nor the ouakf (settlement of property in mortmain) has a real juridical personality. They nevertheless both constitute an aggregation of property distinct from the patrimony of the nazir or the trustee, and independent of the changes undergone by the personality of these individuals).

surprise him. By way of compensation the doctrines are here presented and demonstrated according to a method and in a style he may regard perhaps as too deductive and dogmatic. The writer could scarcely pursue any other course. He has thought it useless to interrogate mute legislations and cite—except for illustration—contradictory decisions, moreover always summarily, sometimes even feebly motived. Besides, this method, wholly deductive, independent of positive law, freed from processes habitual to judicial argumentation, is familiar to those who have approached the problems of private international law. The solving of these problems is hardly ever given by the codes; it must be sought in the nature of things, and the jurisconsult can find but little assistance beyond his reasoning, directed, as is almost always the case, it must be said, by this judicial instinct, thanks to which the arguments are often afterwards found. Upon the particular point which engages us the difficulty is increased by the silence of international custom which, upon a great number of questions, furnishes a very general solution, often insufficient and yet preferable to the complete absence of rule. Here the expounder is abandoned to his own resources; he must decide in the silence or at least in the obscurity of the law, and be guided therefor by the considerations which would inspire the legislator if he had to legislate, without yet enjoying an equal independence and the same freedom of method for the jurisconsult charged with announcing or writing the law, but not making it, is naturally bound by judicial principles that the legislator can avoid. In the system adopted by me I have endeavored to take into consideration notions commonly admitted, acquired by the science, not less than the necessities of practice, in harmonizing the one with the others. This system has its point of support in the traditional notion, undiscussed in respect to the sovereignty in attaching the imaginary being to the State in the territorial limits of which the center of its judicial life is situated, but it respects the will of the parties and the exigencies of the public law of different countries, and so takes cognizance of facts and contingencies in allowing the parties to submit the artificial person to the State upon whose territory it realizes materially its aim, and in distinguishing, when it is a question of association and an endowment, as many nationalities as centers of activity, whenever the territorial legislation demands it.

This absence of legislative provisions from which results such a great uncertainty, manifested by the numerous systems I have reviewed before presenting mine, produces at least a negative result, which will without doubt be considered fortunate; the impossibility of such troublesome situations occasioned by the contradictory pro-

visions of different legislations relatively to the acquisition and the loss of nationality. When two countries admit a different rule for fixing the nationality of the new-born child, when one of them submits the denationalization of its subjects to conditions of which the other takes no account before granting them its allegiance by denationalization or benefit of the law, when finally this denationalization is inflicted by act of penalty or for sanctioning a prohibition, very often persons will be found provided with a double nationality or deprived of all nationality.

Concerning an artificial person, this detestable state of things can be produced only by contradictory jurisprudences, for there can be no conflict of laws where there is no law. It is consequently easier to remedy it than the evil results of the positive or negative conflict of provisions relative to the nationality of the individuals. The work of doctrine in this matter ought to be to restore these jurisprudences to unity. I have endeavored in my modest way to contribute to it. May I at least have rendered evident the impossibility of every system which would adopt an absolute criterion and the necessity of a combination broad and firm sufficiently respectful of all practical necessities to be easily adopted by some international congress and thus become a universal rule.

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